Supreme Court, U.S.
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No. ____

IN THE

Supreme Court Of The United States

October Term, 1994

BLOOMINGDALE PUBLIC SCHOOLS,
a Michigan Corporation;
BLOOMINGDALE PUBLIC SCHOOL BOARD,
Petitioners,

v.

DOTT WASHEGESIC, as next friend of Eric Pensinger;
ERIC PENSINGER, with Dott Washegesic as next friend of,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER AN AFFIDAVIT SUBMITTED AFTER JUDGMENT AND DURING THE PENDENCY OF AN APPEAL, THE MISLEADING NATURE OF WHICH MAY NOT BE SUBJECT TO CROSS-EXAMINATION BY PETITIONERS, MAY BE RELIED UPON BY A COURT OF APPEALS IN RENDERING ITS DECISION ON A QUESTION OF STANDING TO SUE.

2. WHETHER STANDING TO SUE EXTENDS TO GRADUATED STUDENTS OF A PUBLIC HIGH SCHOOL WHO MUST GO OUT OF THEIR WAY TO BE OFFENDED AND WHO CLAIM ONLY ATYPICAL PSYCHOLOGICAL INJURY DUE TO THAT OFFENSE.

3. WHETHER ART WORK DEPICTING AN HISTORICAL AND RELIGIOUS FIGURE IN A NON-RELIGIOUS SETTING, HANGING IN A PUBLIC HIGH SCHOOL CORRIDOR, IS *A PRIORI* A VIOLATION OF THE THREE-PRONG TEST ENUNCIATED IN *LEMON V. KURTZMAN*, OR WHETHER TOTAL EXCLUSION OF SUCH WORKS OF ART FROM THE PUBLIC SCHOOLS WOULD FAVOR A CLASS OF EGGSHELL PLAINTIFFS OVER A BROAD CULTURAL EDUCATION OF ALL STUDENTS.

LIST OF PARTIES

The parties to the United States District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit were Dott Washegesic, as next friend of Eric Pensinger, and Eric Pensinger, with Dott Washegesic as next friend of, and Bloomingdale Public Schools, a Michigan corporation, and the Bloomingdale Public School Board.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The United States District Court for the Western District of Michigan's Opinion and Order of February 3, 1993, amended February 19, 1993, appears at 813 F.Supp. 559 (W.D.Mich. 1993), and at Appendix A below. The Opinion of the United States Court of Appeals for the Sixth Circuit, dated September 6, 1994, appears at 33 F.3d 679 (1994), and at Appendix B below. The Order of the United States Court of Appeals for the

Sixth Circuit, denying Petitioners' petition for rehearing en banc, entered November 18, 1994, appears at Appendix C below.

JURISDICTION

This case seeks review of a decision of the Court of Appeals for the Sixth Circuit entered on September 6, 1994. This is a civil case.

Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action was brought challenging the constitutionality of a public school district hanging an internationally recognized work of art, Warner Sallman's *Head of Christ*, on the walls of a public school building, when such work of art depicts an historical figure whose impact on culture, although significant, has been largely in the realm of religion. The picture at issue has hung on the walls of Bloomingdale High School for 30 years. It is a head and shoulders depiction of Jesus of Nazareth, *sans* halo or any other religious reference point.

Respondents filed suit on October 29, 1992, claiming that the presence of the work of art in question offended the sensibilities of Respondent Eric Pensinger, a senior at Bloomingdale

High School, and that hanging such a work of art in a public school building was a violation of the Establishment Clause of the First Amendment to the United States Constitution. Respondent Eric Pensinger admitted that his tendency to take offense was greater than the average student's, and that nothing in the curriculum or actions of the school during his years at the institution had indicated any official preference for any one religion.

Judgment was rendered in Respondents' favor on February 3, 1993, by the United States District Court for the Western District of Michigan. An appeal was filed by Petitioners, who also offered to hang the picture at issue in a different grouping with other pictures, such as that of Rev. Martin Luther King, Jr. and President Abraham Lincoln.

Respondent Eric Pensinger graduated from high school on June 3, 1993. No attempt was made by Respondents to certify the action as a class action under F.R.C.P. 23, and no monetary damages were claimed.

Petitioners moved for vacation of judgment on the grounds of mootness, which motion was never decided, although in its September 6, 1994 decision affirming judgment for Respondents, the Court of Appeals for the Sixth Circuit relied upon certain statements made in an affidavit submitted by Respondents after the motion had been filed. These statements were an attempt to rehabilitate Respondents as parties with standing, but were not part of the proceedings below and therefore were not subject to cross-examination by Petitioners.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in order to resolve the conflict that has arisen in the Sixth Circuit concerning the frequency of exposure to an "offending" object required to confer upon a citizen standing to sue. Decisions of all circuits have established a requirement for more than casual, infrequent

contact, as well as an assumption by the complainant of a "special burden" in order to avoid the offense. The decision of the Court of Appeals for the Sixth Circuit in the instant case would appear to eliminate such a test from the deciding of a standing issue.

This Court should also grant certiorari in order to resolve the issue raised by the departure of the Court of Appeals for the Sixth Circuit from the usual procedure of appellate courts, in that the Court in the instant case permitted submission of an affidavit by Respondents after the lower court record was closed and while the case was on appeal. This affidavit changed the basis of the standing of Respondents to sue, and alleged certain facts which do not appear on the record below.

These reasons for granting certiorari are further expanded hereafter in this Petition.

I. WHERE PARTIES TO AN ACTION HAVE ALLOWED THEIR CLAIM TO BECOME MOOT, AN AFFIDAVIT SUBMITTED AFTER JUDGMENT AND DURING THE PENDENCY OF AN APPEAL, THE NATURE OF WHICH MAY MISLEAD THE COURT AND WHICH IS NOT SUBJECT TO CROSS-EXAMINATION, CANNOT REHABILITATE THE STANDING OF THAT PARTY TO SUE.

It is the duty of parties to litigation to preserve their claim during the pendency of that action. In the instant case, timely classification of this action as a class action under F.R.C.P. 23 or a claim for monetary damages would have achieved this result. However, Respondents failed to take either of these actions, and decided to let their claim fall by default upon the graduation of Respondent Eric Pensinger.

With a later decision to attempt to rehabilitate their standing, Respondents filed an affidavit with the Court of Appeals,

alleging *new* facts, facts that would lead the Court to believe there was an ongoing imminent threat of further injury to Respondents, and that standing had therefore not been sacrificed. The facts alleged in the affidavit, namely that "[i]n order for me to enter the gymnasium I will be forced to view the picture unless I take an inconvenient detour and enter the gymnasium at the back of the school" (*Affidavit of Eric Pensinger* dated July 20, 1993, attached to the *Plaintiffs-Appellees' Brief in Opposition to Motion to Vacate, Remand and Dismiss*, and Appendix E-3) are incorrect and misleading, since in fact Respondents would have to take an inconvenient detour in order to *view* the picture.

Further, such "facts" do not form part of the record in the proceedings below. This alleged continuing injury appears for the first time in the said affidavit, thus depriving Petitioners of their right to due process of law in cross-examining and contesting the accuracy of the averred facts.

That this defect has caused irreparable damage to Petitioners is demonstrated by the decision of the Court of Appeals that Respondent Eric Pensinger maintains his standing to sue, in spite of his graduation, since attendance at any sports or social events in the school will force him to "confront the portrait whenever he is in the hall" and that he therefore "continues to suffer actual injury." (Washegesic v. Bloomingdale Public Schools, 33 F.3d 679, 681 (1994) and Appendix B-3.)

This Court has recognized the risk of injustice in permitting post-record submissions in numerous cases before it. In *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), this Court expressly refused to consider affidavits, designed to rehabilitate standing, submitted at the appellate level. "[W]e may not rely on the city's affidavit, because it is evidence first introduced to this Court and 'is not in the record of the proceedings below,' *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157, n. 16 (1970)." (*Id.* at 235.)

In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), this Court stated that facts which support the claim, if contested, must be "supported adequately by the evidence adduced at trial." (*Id.* at 115, n. 31.) That Respondent Eric Pensinger, or any other member of the public, will be forced to view the offending work of art each and every time he has cause to enter Bloomingdale Public High School is fiercely contested by Petitioners.

In an attempt to rehabilitate standing, Respondents sought in this post-record submission to change Respondent Eric Pensinger's basis for standing from that of student to that of an invitee who must of necessity be affected by the offending object whenever he attends events at the school (as discussed above, such a premise is denied by Petitioners). Thus, as in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986), "[t]his lawsuit on appeal was not 'the same dispute between the same parties,' [citation omitted], as the one conducted in the District Court." (*Id.* at 550.) In *Bender*, this Court rejected the substitution. We respectfully suggest that it should do so in the instant case as well.

If the substitution of basis for standing be rejected, then there is no case or controversy remaining on which these Respondents may continue this suit, since no action was taken by them to maintain their standing prior to the case becoming moot. The Supreme Court has explicitly stated that, where no personal stake in the outcome is maintained throughout the litigation, cases instigated by students become moot (*Board of School Commissioners of Indianapolis v. Jacobs*, 420 U.S. 128 (1975)).

The predicate of the decision by the Court of Appeals in the instant case was a finding of continuing injury based upon facts averred in a post-judgment affidavit submitted by Respondents. Petitioners respectfully request that this Court reject this submission as improper.

II. WHERE A GRADUATED HIGH SCHOOL STUDENT MUST INCONVENIENCE HIMSELF IN ORDER TO BE OFFENDED AND SUFFER ADMITTEDLY ATYPICAL PSYCHOLOGICAL INJURY, REHABILITATION OF THE COMPLAINANT AS A PARTY WITH STANDING TO SUE IS NOT POSSIBLE.

Even were it proper for the Court of Appeals to admit the affidavit of Respondent Eric Pensinger, Respondents have still failed to state an "injury in fact" which Article III of the Constitution requires "at an irreducible minimum" (*Valley Forge v. Americans United*, 454 U.S. 464, 469 (1982)). In *Valley Forge* this Court noted that psychological harm *alone* is never sufficient to confer standing and, in discussing the case of *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963), noted that there was standing to sue:

> because impressionable schoolchildren were subjected to unwelcome religious exercises or *were forced to assume special burdens* to avoid them.

Valley Forge, 454 U.S. at 486, n.22 (emphasis added).

In *Valley Forge*, then Justice Rehnquist pointed to the uselessness of the entire doctrine of standing if the federal courts were "merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." (*Id.* at 473). As this Court summed up so neatly:

> Although respondents claim that the constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a *consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer

> standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485 (emphasis in original).

In the instant case the Court of Appeals confirmed that real injury is required to convey standing:

> To demonstrate standing a plaintiff must show an "actual injury" caused by defendant's conduct which can be remedied by a court. *City Communications, Inc. v. Detroit*, 888 F.2d 1081 (6th Cir. 1989).

Washegesic, 33 F.3d 679 at 682, and Appendix B-4.

The Court relied heavily upon the argument that continuing enjoyment of the facilities of Bloomingdale Publish High School would necessarily subject any member of the public to an unwanted exposure to a religious object, and therefore cause actual injury. In citing *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047, 89 L. Ed. 2d 575, 106 S. Ct. 1266 (1986), Judge Merritt stated:

> The relevant inquiry in this case is similar to that in any "public-facility" case: whether the individual plaintiff uses the facility and suffers actual injury. *Hawley*, 773 F.2d at 740 (discussing *ACLU v. Rabun County*, 698 F.2d 1098, 1108 (11th Cir. 1983).

Relying on the false assertion made in the affidavit discussed above, the Court of Appeals said that it would be necessary for Respondents to pass the portrait in order to access the gymnasium. In fact, in order to view the work of art at issue, one would have to enter the front doors of the school, walk *past* the gymnasium doors and proceed down the hall for some distance.

Members of the public are not habitually encouraged to wander at will around school facilities when invited to attend sports or social events in the school gymnasium. In the instant case, in order to be offended, Respondents have to go out of their

way to view the work of art. That is *inviting* "injury," not being subjected to it. As this Court has stated in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130; 119 L. Ed. 2d 351 (1992):

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes. . . It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and *the acts necessary to make the injury happen are at least partly within the plaintiff's own control.*

Id. (emphasis added). We respectfully submit that this is exactly the situation in the instant case, and that standing should therefore be denied Respondents.

Further, the "injury" alleged to be suffered by Respondents upon viewing the work of art at issue does not meet the threshold standard required by this Court. As Judges Guy and Norris, in their concurrence noted, someone "could be offended by this portrait, but 'injured' is another matter." (*Washegesic*, 33 F.3d 679 at 684.) The learned judges, inevitably misled by the assertion in the affidavit that exposure to the picture was unavoidable when visiting the school premises, still apparently were troubled as to the level of psychological "injury" to be sustained by "'eggshell' plaintiffs of a delicacy never before known to the law." (*Id.* at 683, Judge Guy concurring.)

The uncontested evidence of the psychiatrist, Dr. Decker, is that "Eric Pensinger's reaction to the print of Jesus is *atypical* of that which would be expected of a 'reasonable observer' of his age." (Appendix F-3.)

If one strips away the coercive element of forced viewing incorrectly claimed in Respondent Eric Pensinger's affidavit of June, 1993, we would respectfully suggest that the "direct" harm

held by the Court of Appeals to be so central to Respondents' standing to sue is also stripped away. The harm is direct only in that Respondents go out of their way to suffer "'unwelcome' direct contact with the offensive object" (*Washegesic*, 33 F.3d 679 at 682, discussing *Harvey v. Cobb County*, 811 F. Supp. 669, 674 (N.D.Ga.), *aff'd* without opinion, 15 F.3d 1097 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2138 (1994), where a lawyer's *regular and unavoidable* contact with a plaque of the Ten Commandments posted in the courthouse conferred standing to sue) by exposing themselves to a known irritant. How "unwelcome" can that contact be if one has to detour in order to view the picture? Crying "Constitutional Foul" after deliberately placing oneself in a position to be offended rather gives rise to Judge Guy's comment: "[S]tay out of the courthouse and quit trivializing the Constitution!" (*Id.* at 684 (Judge Guy, concurring).)

Even if there were rare occasions on which Respondents could accidentally view the offending picture without intending to do so, that would still not confer standing to sue. That more than a rare and cursory contact is required is clear from the caselaw.

Two criteria are generally used to assess the extent to which the mere existence of "offending" objects confers standing on members of the public to sue. First, courts review the amount of direct exposure to the "offending" object. In *Fordyce v. Frohnmayer*, 763 F.Supp. 654 (D.D.C. 1991), for example, the Court dismissed on standing grounds a case challenging anti-religious hate art. The Court stated that "[p]laintiffs do not, however, allege that they had to confront the exhibition daily, that the exhibition was visible in the course of their normal routine, or that their usual driving or walking routes took them through or past the exhibition." As such they "failed to show that they have endured any special burdens that justify their standing to sue as citizens." (*Id.*at 656.) In fact, all of the cases

cited by the Court of Appeals in its opinion were cases in which Plaintiffs were deprived of beneficial usage of a public facility which they *frequently* used, and which reflect the accepted practice of all circuits in addressing the issue of standing. (*See, e.g., Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Harvey v. Cobb County, Ga.*, 811 F.Supp. 669, 674 (N.D.Ga., 1993), *aff'd without opinion*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 114 S.Ct. 2138 (1994); *Birdine v. Moreland*, 579 F.Supp. 412, 415 (N.D.Ga. 1983).)

Second, are there some "special burdens" incurred by the citizen, *e.g.*, "detours" or the "alteration of behavior." Requiring such is sufficient to constitute an impairment of the beneficial use of a public facility which one frequently uses. (See *Hawley*, 773 F.2d at 740; *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), where standing was found, but the mere fact that the display of lighted cross on public property offended plaintiff could not confer standing without a further allegation that he altered his behavior to avoid the cross).

The "psychological consequence presumably produced by observation of conduct with which one disagrees," (*Valley Forge*, 454 U.S. at 485-486), or a "religious difference," (*Doremus v. Board of Education*, 342 U.S. 429, 434 (1952)), is insufficient for the conferring of standing to sue. There must be the assumption of some "special burden," in the form of detour or inconvenience, for standing to be granted.

In the instant case, not only is no such "detour" or "inconvenience" pled or proven in the record, but the latter-day contrivance of such a "special burden" after the completion of the lower court record was incorrect.

We respectfully suggest that Respondents have failed to reach the threshold level that precedent requires to show "standing."

III. WHERE FAMOUS WORKS OF ART DEPICTING HISTORICAL AND RELIGIOUS FIGURES IN A NON-RELIGIOUS SETTING, HANGING IN A PUBLIC HIGH SCHOOL CORRIDOR, CONTRIBUTE TO THE BROAD CULTURAL EDUCATION OF ALL PUBLIC HIGH SCHOOL STUDENTS, THEY ARE NOT *A PRIORI* A VIOLATION OF THE THREE-PRONG TEST ENUNCIATED IN *LEMON V. KURTZMAN.*

In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), this Court enunciated a three-prong test for avoidance of an Establishment Clause violation by government actors. The practice at issue must 1) clearly reflect a secular purpose; 2) have a primary effect that neither inhibits nor advances religion; and 3) avoid excessive government entanglement with religion.

The secular purpose required by the first prong of *Lemon* does not have to be explicitly stated. In each case, it is to be inferred by all the circumstances. Thus, the designation of a work of art *solely* as a religious artifact must be one of factual determination in each case. Were it otherwise, a large percentage of works in all the nation's major art galleries would have to be removed, since many depict religious personages and all are open to the public. Art, and the appreciation of art, must be considered a suitable subject for display in any public arena where there is to be an appeal to the higher faculties of those viewing the work.

The Constitution does not require an anti-religious purge in the public arena. As Judge Guy noted:

> Is there no room under the Constitution for a famous portrait to stand on its own as a work of art? Some of the most famous and now priceless paintings in the

> world depict religious scenes, many of them using Christian figures and symbols.

Washegesic, 33 F.3d 679 at 684, n2 (Judge Guy, concurring).

The record shows that Warner Sallman's *Head of Christ* is a portrait representation of the head of an historical figure with no religious adjuncts, such as a halo, and that it has been reproduced approximately 500 million times around the world. As noted by the Court of Appeals:

> Copies of this painting can be found all over the United States as well as abroad. Most persons have seen a copy dozens of times in various and sundry locations, probably without paying it any particular heed. It no more conveys the notion of the "establishment" of a religion than a statue of Robert E. Lee in a park suggests we should dissolve the Union.

Id. at 684 (Judge Guy, concurring).

The school authorities in Bloomingdale have placed throughout their public school buildings reproductions of famous works of art. They do not in any way, by express comment or indirect implication, convey a message that approval of the style or content of that work is a necessary part of being "accepted" by the school authorities in Bloomingdale. They are merely convinced that education for life is more than the sum total of instructional periods in a schoolroom. Exposure to the cultural heritage of history is an integral part of that education.

That they are concerned with the cultural education of today's youth is laudable, not reprehensible. Clearly, the edification of students in the great art of this and prior centuries is a secular purpose that is worthy of being upheld. That references to religious personages may be included is incidental to that secular purpose.

The inclusion of famous works of art with religious connotations might still be unconstitutionally unacceptable if the

school officials of Bloomingdale made a point of enforcing policies that advanced or inhibited any particular religion (the second prong of *Lemon*). The "secular" purpose of the artwork would then be suspect. However, the record shows that in the instant case this is not so.

The record shows that, throughout Respondent Eric Pensinger's years at Bloomingdale Public High School, nothing in the school had ever given him the impression that Christianity was being endorsed or otherwise sponsored by the school (Appendix D-13-15, 31-33, 34, 37, 38-39); nothing, that is, until in his senior year at the school, Warner Sallman's *Head of Christ* suddenly assumed a character previously unappreciated by Respondent Eric Pensinger (or, apparently, any other student at the school, since the record also shows that the principal was asked the location of the picture at issue by several students subsequent to the filing of the Complaint in this case).

In recognition of Respondent Eric Pensinger's sensibilities, Bloomingdale school officials offered to do what Judge Guy subsequently suggested should be done; "tackle the problem with some good old Yankee ingenuity" (*Washegesic*, 33 F.3d 679 at 684 (Judge Guy, concurring)). They offered to hang other portraits, including those of Abraham Lincoln, Mahatma Gandhi and Martin Luther King, Jr., beside the painting at issue, together with a disclaimer. Respondents, however, are determined to impose their own "fundamentalist secularist" viewpoint on all the students and faculty of Bloomingdale High School, in spite of Respondent Eric Pensinger's admissions that he has "heightened sensibilities" about this issue, and that an average student would not share his perception on this issue. (Appendix D-19, 39, and F-7.)

Respondents' aversion to all things religious does not reflect the Constitutional provisions upon which they are relying:

> The First Amendment does not prohibit practices which by any *realistic measure create none of the dangers which it is designed to prevent* and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have *meaningful and practical impact.*

Lee v. Weisman, 112 S.Ct. 2649, 2661 (1992) (emphasis added). Reality does not demand total exclusion of all things religious from the school environment, in order to accommodate a hypersensitive graduating student who admits that he perceives everything allowed within the school gates (from pictures, to T-shirts, to the contents of every book in the school library) as being endorsed by the school (Appendix D-20-21). Common sense dictates that there has to be some threshold which must be crossed before the Establishment Clause of the First Amendment is violated, some *de minimis* advancement or inhibition of religion, some *de minimis* entanglement between the government and religion.

We would respectfully submit that this approach underlies the refinement of the second prong of the *Lemon* test propounded by Justice O'Connor in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), requiring an inquiry into "whether a *reasonable observer* would perceive government action to be an endorsement or disapproval of religion." (*See Slotterback v. Interboro School District*, 766 F.Supp. 280, 295 (E.D.Pa. 1991).

Similarly, in *Americans United v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992)(in banc), the Court found that the reasonable observer must be "objective," that he does not look upon religion "with a jaundiced eye" and that an "Ignoramus's Veto" is not to be countenanced. *Id.* at 1553.

Respondents are not the "reasonable observer" required by this Court's ruling in *Allegheny*:

> Accordingly, we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the government] endorses religion. Instead, we ask whether *the* reasonable observer *would* conclude that [the government] endorses religion by allowing [the portrait's] display.

Id. at 1543-1544. As discussed above, the psychiatrist who evaluated Respondent Eric Pensinger found that his reaction to the portrait at issue "is *atypical* of that which would be expected of a 'reasonable observer' of his age." (Appendix F-3).

A decision to remove the portrait, at the demand of one admittedly atypical individual, demonstrates an unconstitutional hostility towards religion, rather than the present, constitutional, neutrality of the school authorities which is clearly shown by the record. As this Court said in *Lynch v. Donnelly*, 465 U.S. 668 (1984):

> [T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

Id. at 673. The efforts of school officials to accommodate Respondents' unique sensibilities by adding other works of art to the wall on which the portrait hangs, and a disclaimer clarifying the purpose behind the hanging of the works of art, was an effort to eliminate any possible subjective impression of endorsement of religion which might be given to any other person with limited understanding of the difference between acknowledgement of existence and advancement of philosophy. The strenuous efforts of the school to ensure neutrality towards religion within the Bloomingdale school system, and inculcate in its young people the importance of tolerance and independent thought compares very favorably with the unwillingness of

Respondents to countenance any religion but their own "fundamentalist secularism."

The real world contains many behaviors and viewpoints with which we disagree, sometimes extremely strongly. The only way to avoid such behaviors and viewpoints is to spend one's life in a cocoon. A late 20th century high school is not the place to encourage cocoon-like behavior. It should prepare students for the adult world. Viewing a portrait which may, *subjectively*, suggest opinions with which one disagrees is surely a rather minor part of that education.

The third prong of the *Lemon* test requires that there should be no excessive entanglement of government with religion. The school authorities have assiduously refused to delve into the relative merits of any religion, whether it be that of Respondents (for a religion is surely to be defined as a belief system) or that of any other person who may enter the school gates. Such inquiries would be impermissible and active involvement in religion, and therefore unconstitutional. The hanging of world famous works of art is not an inquiry into religion, especially where it bears no overt religious characteristics and delivers no religious message.

Petitioners therefore respectfully submit there has been no violation of the *Lemon* test as refined by decisions of this Court.

CONCLUSION

Petitioners submit that the Bloomingdale Public School Board has shown clearly a legitimate secular purpose in allowing the portrait at issue to hang for 30 years on the walls of the school building, that they have demonstrated a policy which neither inhibits nor advances religion when the "reasonable observer" test is applied, and they have strictly ensured there is no excessive entanglement between government and religion.

Petitioners further submit that Respondents have failed to maintain their standing to sue, that no case or controversy remains to be decided, and that this case is therefore moot.

Accordingly, we respectfully request that this Court reverse the decision of the lower courts with respect to the constitutionality of the hanging of this famous work of art in the Bloomingdale High School.

Respectfully submitted,

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February 15, 1995

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

File No. 4: 92-CV-146

DOTT WASHEGESIC, as Next Friend to ERIC PENSINGER,
Plaintiff,

v.

BLOOMINGDALE PUBLIC SCHOOLS,
a Michigan Corporation, and
the BLOOMINGDALE PUBLIC SCHOOL BOARD,
Defendants.

Reported at 813 F. Supp. 559
Decided, February 3, 1993
Filed, February 3, 1993

For Plaintiffs: SUSAN M. FALL, LAURIE L. WIGHTMAN, KALAMAZOO, MI, PAUL J. DENENFELD, LEGAL DIRECTOR, DETROIT, MI.

For Defendants: DAVID R. MELTON, THE RUTHERFORD INSTITUTE, GRANDVILLE, MI.

Before: GIBSON, District Judge

Opinion by: Hon. Benjamin F. Gibson

The case before the Court arises under the First Amendment of the United States Constitution. For at least thirty years, a framed print of artist Warner Sallman's Head of Christ has been displayed in the hallway of Bloomingdale Secondary School. Eric Pensinger, a high school senior, requests that this Court order that the picture be removed because he feels it violates the Establishment Clause of the First Amendment.

Pending before the Court is plaintiff's motion for a preliminary injunction. The Court entertained oral argument on the motion on January 11, 1993. At the hearing, the Court agreed to permit the parties to file post-trial briefs on the issues before the Court. The Court also indicated that it would consider the advisability of consolidating the preliminary injunction hearing with the trial on the merits pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. The Court now determines that it does not need additional testimony or evidence to render a decision in the case.[1] The Court therefore consolidates the preliminary injunction hearing with the trial on the merits and renders the following final decision in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

I.

The print which has caused the controversy at issue is of the figure Jesus of Nazareth who is revered as Jesus Christ, the son of God, by those who practice Christianity. There is no dispute that the picture hangs in the school hallway. In fact, defendants admit that it is bolted to the hallway wall. There is also no dispute that the figure in the picture is Jesus.[2] Furthermore, the parties agree that Bloomingdale Secondary School is both a middle school and a high school and that its student population includes children and adolescents attending the seventh through the twelfth grades.

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[1] Plaintiff has agreed that the case is ripe for disposition. Defendants argued that it wished to have the opportunity to present testimony from expert witnesses such as psychiatrists and psychologists about whether or not adolescents in the seventh through twelfth grades can make distinctions between school endorsement of a religious idea, concept, or symbol and a school's refusal to censor the same. The Court feels that such testimony is unnecessary in light of what it finds to be clear Supreme Court precedent. The Court has, however, reviewed the expert affidavit and other material that defendant attached to its supplemental brief. It has also reviewed the deposition transcripts taken in the case.

[2] The depictment does not portray any particular scene from the life of Christ, and Jesus is depicted without a halo or other sign of divinity.

The only factual dispute in the case concerns whether the print is "prominently displayed." The Court finds, after looking at a floor plan of the school and photographs of the picture, that its display is prominent. Located at an intersection of two main hallways, the picture hangs just outside the principal's office and near the gymnasium. Defendants have admitted that almost all students pass by the picture at least once a day. The dimensions of the portrait are approximately two feet by three feet, and it is in a gilt frame. The print is not part of a larger display of religious or historical figures. [3]

Eric Pensinger does not identify with the Christian faith and does not worship Jesus Christ or believe him to be a divine being. (Affidavit of Eric Pensinger at P 9). Pensinger avers that the display of the picture suggests to him that his school endorses Christianity and that its officials believe something is wrong with him because he does not subscribe to a Christian religion. (Affidavit of Eric Pensinger at PP 10 and 11).

II.

The First Amendment to the United States Constitution states, in part: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, ...

This Amendment was introduced as part of the Bill of Rights. James Madison, who proposed these amendments to the newly formed House of Representatives, explained that their purpose was to "limit and qualify the powers of government" by prohibiting government from exercising its power in "those cases in which the government ought not to act, or to act only in a particular mode." "James Madison: A Bill of Rights Proposed," 3 *Annals of America* at 360 (1968) (excerpted from I *Annals of Cong.*, 424-50 (1789)). Madison believed that such limitations would guard against "the abuse of the executive,"

[3] The wall on which the picture is hung contains a painting of the school's mascot and some announcements; however, these seem to have no relation to the picture and do not add to or detract from the impression it makes.

but he also hoped that it would guard against abuses that might be committed by "the community itself." *Id.* In other words, one of the objects of the Bill of Rights was to protect the minority from the tyranny of the majority.

In order to more fully understand the Establishment and the Free Exercise Clauses, it is instructive to examine a debate that occurred in the Commonwealth of Virginia some years prior to the ratification of the Constitution. During the 1784-85 session of the General Assembly, a bill was introduced into the Virginia House of Delegates which proposed that teachers of the Christian religion receive funding from the state. James Madison and Thomas Jefferson led the fight against this measure. In an eloquent pamphlet circulated to the citizenry, Madison argued that the reverence each person owed the Creator was a personal matter and that it was "the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him." Madison, "Memorial and Remonstrance Against Religious Assessments," 2 *The Writings of James Madison* 184 (ed. Gallard Hunt, 1901). True religion, Madison explained, did not require government support in order to flourish. *Id.* at 187. Madison declared that in matters of religion it was proper "to take alarm at the first experiment on our liberties" (*Id.* at 185) and noted that "the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease a particular sect . . . in exclusion of all other sects." *Id.* at 186. Madison concluded that the establishment of religion would be contrary to "that generous policy, which, offering an asylum to the persecuted and oppressed of every nation and religion, promised a luster to our country . . . ." *Id.* at 188. The bill was defeated and, instead, Virginia passed a statute of Religious Freedom, drafted by Thomas Jefferson, which served as a model for framers of the First Amendment.[4]

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[4] Jefferson took great pride in this statute. By his own request, his epitaph reads: "Here was buried Thomas Jefferson, author of the Declaration of American Independence, the statute of Virginia for religious freedom,

Throughout our history, the Supreme Court has many times been called upon to interpret the scope and breadth of the Establishment and the Free Exercise Clauses.[5] The Establishment Clause [6] has been found, by a long series of cases, not merely to prevent the government from establishing a particular religion but also to prohibit it from promoting religion over nonreligion. *See, e.g., Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-11, 92 L. Ed. 649, 68 S. Ct. 461 (1948); *McGowan v Maryland*, 366 U.S. 420, 442-43, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); *School District of Abington Township v. Schempp*, 374 U.S. at 217. Perhaps the best explanation of this proscription appears in *Epperson v. Arkansas*, in which the Supreme Court held:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

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and father of the University of Virginia." Jefferson declared: "By these, as testimonials that I have lived, I wish most to be remembered." "Thomas Jefferson: Virginia Statute of Religious Freedom," 3 *The Annals of America* at 53 (1968).

[5] The First Amendment did not apply as a restraint against the states until it was made applicable to them by the passage of the Fourteenth Amendment although most states adopted similar state constitutional protections. *Everson v. Board of Education*, 330 U.S. 1, 13-14, 91 L. Ed. 711, 67 S. Ct. 504 (1947).

[6] Because this case is brought under the Establishment Clause, the Court focuses on its history. The Court bears in mind, however, that the Free Exercise and Establishment Clauses may overlap or even, at times, conflict. *See School District of Abington Township v. Schempp*, 374 U.S. 203, 222, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963).

Epperson v. Arkansas, 393 U.S. 97, 103-04, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968).

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987). The Court has held that such vigilance is warranted because "families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* at 584. Furthermore, the Court has noted that students attending such schools are young and impressionable and that their attendance at the school is involuntary. *Id.*

To protect school children from violations of the Establishment Clause, the Supreme Court has invalidated the invocation of a nonsectarian prayer at a graduation ceremony (*Lee v. Weisman*, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992)), a statute authorizing a daily moment of silence for prayer in school classrooms (*Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)), a statute requiring that a copy of the Ten Commandments be posted in every classroom (*Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980)), a statute prohibiting the teaching of evolution in state-funded schools (*Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968), a statute requiring that the Bible be read before class in public schools (*School District of Abington Township v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963)), the requirement that a nonsectarian prayer be said at the beginning of the school day (*Engel v. Vitale*, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962)), and a school's practice of allowing religious instruction on school property during the school day (*Illinois ex rel. McCollum*, 333 U.S. 203, 210-11, 92 L. Ed. 649, 68 S. Ct. 461 (1948)). The Court has also invalidated

several arrangements through which public money, directly or indirectly, contributed to religious education. *See, e.g., Grand Rapids School District v. Ball*, 473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973).

The Supreme Court has articulated a three-prong test which must be applied to determine whether a particular action violates the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). According to the *Lemon* test, a practice is constitutional only if it (1) reflects a clearly secular purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) avoids excessive government entanglement with religion. *Lemon*, 403 U.S. at 612; see also *Nyquist*, 413 U.S. at 773. The *Lemon* court noted that the First Amendment did not merely prohibit establishment of religion but that it also prohibited any law "respecting" the establishment of religion. The Court cautioned that a law might be one "respecting" the establishment of religion even though no religion was ever actually established. *Id.*

III.

Examination of the historical background of the Establishment Clause and of the Supreme Court's interpretation of it over time convinces this Court that the display of the portrait of Jesus in the public school is unconstitutional. Despite the defendants' recitation of an alleged secular purpose for display of the print, the Court finds that the true objective is to promote religion.[7] The Court also finds that the primary effect of the school's display of the picture is to advance religion in general

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[7] Indeed, as plaintiff notes in his supplemental brief, school officials were not able to assert any purpose behind the original decision to display the picture, and they stated during deposition that the only reason for not taking it down was because they wished to avoid censorship. *See* Hoke Deposition at 23, 54; Tuinstra Deposition at 7, 10; Dickerson Deposition at 15.

and Christianity in particular.[8] Finally, the Court finds that the display of the picture excessively entangles government in religion.

This Court's decision is based on a close and careful reading of all relevant case law. Two cases in particular, however, support this holding and warrant a more detailed discussion. These cases are *Stone v. Graham* and *Lee v. Weisman*. In *Stone v. Graham*, the Supreme Court struck down a statute requiring the posting of the Ten Commandments in public school classrooms. The Supreme Court held that the purpose of posting the Ten Commandments was religious as the Commandments were "undeniably a sacred text in the Jewish and Christian faiths," and it added that the mere recitation of a secular purpose did not "blind [the Court] to that fact." *Stone*, 449 U.S. at 41. The Court emphasized that the Commandments were not integrated into a particular course of study, and it found the effect of displaying the Commandments would be "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey" them. *Id.* at 42.

Like the Ten Commandments, the portrait of Jesus serves a primarily religious purpose. Jesus Christ is, if anything, more fundamental to the doctrine of Christianity than the Ten Commandments are to either Judaism or Christianity. Defendants' declaration that the picture is displayed as an artistic work or that it is a depiction of a historical figure does not blind this Court to the religious message necessarily conveyed by the portrayal of one who is the object of veneration and worship by the Christian faith. As was the case with the Ten Commandments in *Stone*, the picture is not placed in a historical, ethical, or artistic context. It stands alone on the school wall where its

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[8] If in no other way, the display of the portrait advances Christianity because it exposes students to the fundamental figure of the Christian religion without providing them access to portrayals of leaders, prophets, or divinities of other religions or to depictions of advocates of nonreligion.

effect, if any, is to make children look at, meditate upon, and perhaps revere Jesus Christ. "However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone*, 449 U.S. at 42.[9]

Lee v. Weisman is the Supreme Court's latest Establishment Clause Opinion.[10] In *Lee*, the Supreme Court declared unconstitutional a school's decision to have a prayer delivered at a graduation ceremony despite the fact that the prayer was nonsectarian. The Court explained that certain acts which "to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 112 S. Ct. at 2658. The Court found that the school's supervision and control of a graduation cere-

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[9] Defendants argue that this case is distinguishable from *Stone* because the statute at issue in that case required that the Ten Commandments be put up while this case involves a decision about whether a picture, which has been a fixture at the school for thirty years, must come down. Defendants claim that there is a vast difference between the act of posting and the act of removing. (Defendants' Supplemental Brief at 14-15). Defendants support their argument by citing *Board of Education v. Pico*, 457 U.S. 853, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982) (plurality opinion). In *Pico*, the Supreme Court expressed less reluctance about prohibiting schools from removing books from libraries because of their content than it did from becoming involved in routine decisions made by the school about what books to acquire. The case thus turned upon the Free Speech Clause and not the Establishment Clause and is completely distinguishable from this case.

This Court's analysis does not depend upon the length of time the picture has hung on the school wall. The Court cannot countenance a constitutional violation simply because it is longstanding.

[10] Although the School and the United States Government, acting as amicus, invited the Supreme Court to reconsider its decision in *Lemon*, the Court declined, but the majority Opinion did not discuss the traditional three-prong test when analyzing *Lee*.

mony placed public and peer pressure upon students to, at least, respect the religious practice embodied by the prayer. The Court indicated that such pressure, though subtle and indirect, could "be as real as any overt compulsion." *Id.* The Court further found that adolescents are more susceptible to pressure to conform than are mature adults. *Id.* at 2658-59.

The facts surrounding the graduation ceremony at issue in *Lee* gave the imprimatur of school sponsorship and approval of the prayer invoked therein. Similarly, in the case before this Court, the fact that a portrait of Jesus hangs in the school's hallway implies school endorsement of the picture. Students may feel pressure, if not to believe in the teachings of Jesus, at least to suppress any disagreement they might have with the Christian religion. Many of the students attending the Bloomingdale Secondary School are younger than students participating in the graduation ceremony at issue in *Lee* and thus are even more susceptible to government and peer pressure. In *Lee*, the prayer was invoked only once a year in the context of a ceremony which students were not compelled to attend; whereas, Pensinger and his classmates are required to attend school, at least until the age of 16, and must pass by the picture every day.

Defendants argue that *Lee* is distinguishable because it involved a ceremony in which students were asked to bow their heads in a state-conducted "religious exercise." Because students at Bloomingdale are not required by rule or custom to observe any particular practice in connection with the picture, defendants assert that this case does not involve such a religious exercise and that it is therefore not controlled by *Lee*. The Court does not believe that the concerns voiced by the Supreme Court about the impressionability of school age students[11] and about

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[11] Defendants maintain that the Supreme Court "has rejected the impressionability argument for secondary school students." (Defendants' Supplemental Brief at 15). Defendants' conclusion is based upon *Westside Community Education v. Mergens* in which the Supreme Court stated: "We think that secondary school students are mature enough and are likely to

their susceptibility to coercion from government and peers is limited to situations involving religious exercises. In the opinion of this Court, any action of the state which, either directly or indirectly, conveys that religion, or a particular type of religion, is more accepted, respected, or tolerated than another value system has the potential to subtly coerce students to acquiesce to the promoted religion. The Court finds that the school's display of the portrait of Jesus may well have such a coercive influence and that it is therefore unconstitutional under the rationale of *Lee*.

IV.

While the Court finds that the cases discussed above are dispositive of the outcome of this issue, it feels compelled to discuss the arguments defendants have raised at the January 11 hearing and in pre- and post-trial briefs. The Court finds none of these arguments persuasive.

First, defendants assert that "mere exposure" to materials objected to on religious grounds is not unconstitutional and that

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understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1989). The Supreme Court has obviously not "rejected" the impressionability argument for secondary school students since it discussed impressionability at length in *Lee*, a case which was decided after *Mergens*.

In *Mergens*, the Supreme Court discussed students' rights to attend extra-curricular religious clubs which met under the same conditions as nonreligious clubs. The Court upheld the Equal Access Act, which prohibits public secondary schools with "limited open forums" from discriminating against students who wish to conduct a meeting within that forum if that discrimination is based upon religious, political, philosophical, or other content of the speech at such meetings. The Court noted that the Act specifically limits participation by school officials and requires that the voluntary meetings be held during "noninstructional time." *Id.* at 251. The Court concluded that while there was a possibility of peer pressure, there was "little if any risk of state endorsement or coercion." *Id.* *Mergens* is factually distinct from the case before this Court as this case does not concern student speech nor is the wall upon which the picture hangs a "limited public forum."

the school should not have to "sanitize" its building of every vestige of religious material. The Court agrees with defendants; however, there is a marked contrast between requiring that the school dispel every trace of objectionable material and ordering that it remove, from prominent display, the portrait of the leading figure of the Christian religion.

Defendants' second argument is that the picture is not inherently religious. While defendants admit that Jesus conveys a religious message to Christians, they contend that "to the Jew he is generally recognized as a first century rabbi . . . .; to the Moslem he is generally recognized as a prophet; to a Buddhist, an enlightened one; and to nearly all he is recognized as a historical figure and moral leader." (Defendants' Brief at 9).[12] To some degree, the meaning of anything witnessed, heard, or experienced is subjective. However, shared culture and common media exposure have invested certain objects and events in our society with a universal meaning, although there may be a rare exception.[13] The Court finds that any reasonable observer would find that the picture of Jesus transmits a religious message.[14]

Defendants' third argument is that the role of the school is to act with "benevolent neutrality" and that if they removed the picture they would be censoring religious expression. A similar argument was recently made to the Seventh Circuit in defense

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[12] By citing Jesus' role in religions other then Christianity, defendants may well be trying to show that Jesus is important, if not central, to all religions. Even if the Court were to assume that this dubious proposition were true, defendants' argument is to no avail as the Establishment Clause prohibits the fostering of religion, in general, over nonreligion.

[13] Defendants might just as well argue that a crucifix to the nonbeliever is simply a work of art.

[14] In *Stone v. Graham* discussed above, the Supreme Court invalidated a law requiring the posting of the Ten Commandments despite the fact that it was arguable that nonbelievers might view the Commandments as a useful moral code.

of a public school's decision to allow the distribution of Gideon Bibles in the school. The Seventh Circuit determined that the argument "distorted the facts" and "misconstrued the law." *Berger v. Rensselaer Central School Corporation*, 982 F.2d 1160 (7th Cir. Jan. 5, 1993). The Seventh Circuit first noted that defendants' free speech argument depended upon the presumption that the school was not a state actor while its tacit approval of Bible distribution on its premises carried the imprimatur of state involvement. Similarly, in this case, defendants repeatedly express reluctance to "censor" the picture while ignoring the fact that defendants, themselves, are responsible for its continued display.[15]

In *Berger*, the Seventh Circuit also held that defendants were wrong to assume that the First Amendment interest in free expression "automatically trumps" the First Amendment prohibition on state-sponsored religious activity. *Id.* at *11. The court reviewed other cases in which activities were found to violate the Establishment Clause and noted that invalidating such activities necessarily infringed on free speech and free exercise rights. The Seventh Circuit held that in such cases expressive activity "may be stifled in the government's vigilance to remain neutral toward religion." *Id.* at *11 (internal citations omitted). Relying on the rationale of *Berger*, the Court finds that defendants' concerns about free speech and free exercise are not adequate reason to allow the picture to remain.[16]

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[15] Defendants attempt to minimize their relationship to the picture by insisting that it was placed in the school by an "unknown donor." While the original placement of the picture may have been at the instigation of someone outside the school, there is no dispute that the picture is now the property of the school and that the hallway in which it is placed is under the school's direct control and ownership.

[16] Defendants make the related argument that the school is a public forum. The school building is clearly not a traditional public forum open to all persons who might wish to take advantage of it. Defendants contend, however, that the school is a limited public forum and that, under the rationale of *Mergens* and *Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S.

Defendants contend that the Court should examine this case under the Supreme Court's rulings in "religious display cases" which discuss the extent to which the state can exhibit religious symbols on public property. Even if the Court were to determine that this case should be governed by the jurisprudence of the religious display cases instead of by the long line of carefully reasoned public school opinions, defendants' argument would be to no avail. In one of the Supreme Court's most recent public display cases, *County of Allegheny v. Greater Pittsburgh ACLU*, the Court held that the question of the constitutionality of government use of an object with religious meaning turns on an inquiry into whether display of the object has the effect of endorsing religion. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 595, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989). The Court found that to answer this inquiry a court must determine "what viewers may fairly understand is the purpose of the display." *Id.* The Court held that this factor depended, in turn, upon the context in which the contested object appears. *Id.* In this case, the prominence of the picture in the hallway, the fact that it is not part of a larger display, and the fact that it is not incorporated into a class, lecture, or other context has the effect of endorsing religion in general and Christianity in particular. Therefore, even under the Supreme Court's holiday display jurisprudence, the portrait must be removed.

Ct. 269 (1981), it should be open to the expression of all ideas, even religious ones. This case, however, is factually distinguishable from both *Mergens* and *Widmar* because they involved the free speech and exercise rights of individual students, not of the school itself.

Defendants also argue that the school should be a "marketplace of ideas." However laudable this goal may be in theory, it is clear that, in practice, the school has "cornered the market" on all ideas expressed through the medium of the hallways. Defendants control the content of what is placed on the school walls. Defendants admit that the school does not allow vulgarities, offensive materials (racially), slander, or expression that is not "of good quality" to be displayed on the wall. (Defendants' Supplemental Brief at 12).

Finally, defendants argue that there is no "absolute" separation of church and state. (Defendants' Supplemental Brief at 15 (citing *Lynch v. Donnelly*, 465 U.S. 668, 673, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984))). This Court agrees that cases may arise in which the state's involvement with religious objects is so peripheral that it passes Constitutional muster, but it finds that this is not such a case. As discussed above, the purpose of the Establishment Clause and the history of its interpretation compel this Court to find that the display of the portrait in question is unconstitutional.

V.

For the reasons stated above, this Court finds that the display of the portrait of Jesus is an unconstitutional violation of the Establishment Clause. This is a final ruling on the merits of the case. In deference to the defendants' request that they be allowed a reasonable time for appeal to seek a stay from the Sixth Circuit, the Court delays enforcement of the injunction. Accordingly, the portrait of Jesus Christ shall be removed from the wall of the Bloomingdale Secondary School no later than March 1, 1993.

Dated: February 3, 1993

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

INJUNCTION and FINAL JUDGMENT - Filed, February 3, 1993.

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 3rd day of February, 1993.

In accordance with the Opinion dated February 3, 1993,

IT IS HEREBY ORDERED that defendants Bloomingdale Public Schools and Bloomingdale Public School Board are enjoined from displaying the print of artist Warner Sallman's

Head of Christ in the Bloomingdale Secondary School.

IT IS FURTHER ORDERED that the picture be removed no later than March 1, 1993.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-1248

DOTT WASHEGESIC, as Next Friend of Eric Pensinger;
ERIC PENSINGER, with Dott Washegesic as Next Friend of,
Plaintiffs-Appellees,

v.

BLOOMINGDALE PUBLIC SCHOOLS,
a Michigan Corporation;
BLOOMINGDALE PUBLIC SCHOOL BOARD,
Defendants-Appellants.

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33 F.3d 679

June 16, 1994, Argued
September 6, 1994, Decided
September 6, 1994, Filed

Rehearing En Banc Denied November 18, 1994,
reported at: 1994 U.S. App. LEXIS 33072.

On Appeal from the United States District Court for the Western District of Michigan. District No. 92-00146. Benjamin F. Gibson, Chief District Judge.

Before: MERRITT, Chief Judge; NORRIS, Circuit Judge; and GUY,* Senior Circuit Judge. MERRITT, Chief Judge, delivered the opinion of the court. GUY, Senior Circuit Judge, delivered a separate concurring opinion. NORRIS, Circuit Judge, concurred in both the opinion of the court and the separate concurrence.

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* The Honorable Ralph B. Guy, Jr. assumed senior status on September 1, 1994.

MERRITT, Chief Judge.

The defendants appeal an injunction from the district court requiring them to remove a portrait of Jesus Christ that has been hanging alone in the hallway of the Bloomingdale Secondary School for the last thirty years. Plaintiff, a student at the school, filed suit alleging that the display of the portrait violated the Establishment Clause of the First Amendment. After the district court's decision, plaintiff graduated. The issues presented are whether the appeal should be dismissed as moot and whether the display of the portrait violates the Establishment Clause.

The facts of the case are undisputed. Eric Pensinger, then a senior, brought suit to remove a copy of Warner Sallman's famous portrait, "Head of Christ," from being displayed in a hallway outside the gymnasium and the principal's office of the Bloomingdale Secondary School. Bloomingdale is a small rural community near Kalamazoo, Michigan. The portrait, originally donated to the school, is not part of a group of paintings nor is it used in conjunction with any class or educational program. Nearby in the same hallway are trophy cases, a painting of the school mascot and a bulletin board, but as Judge Gibson noted, "these seem to have no relation to the picture and do not add to or detract from the impression it makes." *Washegesic v. Bloomingdale Pub. Sch.*, 813 F. Supp. 559, 560 n.3 (W.D. Mich. 1993). The judge held that the portrait violated the Establishment Clause; and in order to avoid damage to the portrait which is bolted to the wall, he allowed the picture to be covered with a cloth pending the outcome of this appeal.

The Mootness Claim

Eric Pensinger graduated on June 3, 1993. The defendants argue that there is no longer a case or controversy because plaintiff has no stake in the outcome of the case. Defendants cite cases that a plaintiff's graduation can moot a claim against a school, *Board of School Comm'rs of Indianapolis v. Jacobs*, 420 U.S. 128, 129, 43 L. Ed. 2d 74, 95 S. Ct. 848 (1975) and

Ahmed v. University of Toledo, 822 F.2d 26 (6th Cir. 1987); but these cases are not on point. In *Jacobs*, plaintiffs challenged the constitutionality of school rules which regulated the student newspaper. The rules no longer applied to the plaintiffs after graduation. The Supreme Court dismissed the appeal when it learned at oral argument that all the plaintiffs had graduated. *Jacobs*, 420 U.S. at 129. In *Ahmed*, foreign students challenged the constitutionality of a university policy requiring them to carry health insurance. By the time the case reached the appellate level, the plaintiffs had graduated or dropped out of school permanently and the court dismissed the case as moot. *Ahmed*, 822 F.2d at 28.

In *Jacobs* and *Ahmed* the plaintiffs ceased to have any interest in the challenged policy and could not be affected by it after they were no longer students. The rules could no longer harm them. Here, conversely, the portrait of Jesus affects students and non-students alike. Status as a student is not necessary for standing in such cases. Pensinger still visits the school and will confront the portrait whenever he is in the hall. His girlfriend is a student, and he attends sporting events, dances and other social functions in the gym and at the school. Thus, plaintiff claims that this case is not moot because he continues to suffer actual injury.[1]

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[1] Plaintiff originally alleged these facts, arguing that this case is not moot because it is "capable of repetition yet evading review." Two criteria must be satisfied to apply this exception to the mootness doctrine. Plaintiff must show that the duration of the dispute is too short to be fully litigated and that there is a reasonable expectation that the same plaintiff will be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 46 L. Ed. 2d 350, 96 S. Ct. 347 (1975); *Ahmed*, 822 F.2d at 28. The instant dispute does not "evade review" because students attend the secondary school for six years (grades 7-12), long enough for a suit to be tried and resolved. *See Ahmed*, 822 F.2d at 28 (four years deemed long enough for students to bring challenge evading review doctrine not applied).

Mootness is "the doctrine of standing set in a time frame." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980) (citation omitted). The issue is whether plaintiff has standing to continue this appeal. To demonstrate standing a plaintiff must show an "actual injury" caused by defendant's conduct which can be remedied by a court. *City Communications, Inc. v. Detroit*, 888 F.2d 1081 (6th Cir. 1989). As in many First Amendment cases, the injury can be non-economic. *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047, 89 L. Ed. 2d 575, 106 S. Ct. 1266 (1986). The use of governmental authority to encourage a sectarian religious view is a sufficient injury if directed toward the plaintiff.

In *Hawley*, citizens challenging the lease of space for a chapel at the Cleveland airport were denied taxpayer standing but were granted standing for their actual injury when they used the airport. *Id.* at 740. The injury which conferred standing was the "impairment of their beneficial use of a public facility which they frequently use." *Id.* In this case, similarly, the portrait affects in some measure Pensinger's use of the school. His graduation does not end the case because the portrait does not affect students only — it potentially affects any member of the public who attends an event at the school. A member of the PTA or a member of the public would have standing if she attended events in the gymnasium and took the portrait as a serious insult to her religious sensibilities. *Cf. Jager v. Douglas County School District*, 862 F.2d 824, 826 n.1 (11th Cir.) (graduated student and father (individually) challenging prayer at high school football games permitted to "continue this suit . . . as people who attend the football games"), *cert. denied*, 490 U.S. 1090, 104 L. Ed. 2d 988, 109 S. Ct. 2431 (1989). The relevant inquiry in this case is similar to that in any "public-facility" case: whether the individual plaintiff uses the facility and suffers actual injury. *Hawley*, 773 F.2d at 740 (discussing *ACLU v. Rabun County*, 698 F.2d 1098, 1108 (11th Cir. 1983) (plaintiffs

granted standing to challenge cross displayed in Georgia state park because use was "conditioned upon the acceptance of unwanted religious symbolism")).

The cases are in some conflict and the doctrine is somewhat confused. Although it may be true that psychological harm alone is not always a sufficient injury for standing purposes when contact is indirect, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982), "'unwelcome' direct contact with the offensive object is enough." *Harvey v. Cobb County*, 811 F. Supp. 669, 674 (N.D.Ga.)(lawyer had standing based on regular contact with Ten Commandments posted in courthouse), *aff'd without opinion*, 15 F.3d 1097 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2138 (1994); *see also Murray v. Austin*, 947 F.2d 147, 151 (5th Cir. 1991)(citizen had standing based on "exposure" to city insignia which contained cross), *cert. denied*, 120 L. Ed. 2d 899, 112 S. Ct. 3028 (1992). Here, Pensinger's contact with the school and the portrait is direct.

Defendants rely heavily on the language in *Valley Forge* that the "psychological consequence presumably produced by observation of conduct with which one disagrees" is not sufficient to confer standing. *Valley Forge*, 454 U.S. at 485. The court in *Rabun County* discussed the distinction between this broad language in *Valley Forge* and the other Establishment Clause cases in which contact with the offensive object did constitute a sufficient injury. *Rabun County*, 698 F.2d at 1104-09. The outcome depends on the directness of the harm. *Valley Forge* was a citizen's suit. Plaintiffs were members of an organization challenging a government action they learned about through a news release. Their grievance had a vicarious quality. They objected in a general way as citizens. They had no direct contact with the dispute, and their minor "psychological injury" from being offended did not give them standing. *Id.* (discussing *Valley Forge*). Here, as in *Rabun County, Harvey*

and *Murray*, plaintiff has continuing direct contact with the object at issue. His grievance is not remote, vicarious or generalized as in *Valley Forge*. In *ACLU v. St. Charles*, the court brought up another factor to distinguish generalized from specific harm: "Maybe it ought to make a difference if (as here) a plaintiff is complaining about the unlawful establishment of a religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere." 794 F.2d 265, 268 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986). The practices of our own community may create a larger psychological wound than someplace we are just passing through.

In *Jacobs* and *Ahmed*, the policies affected certain students because and only because they were students. Upon leaving school, the alleged injury ceased to exist. Here, any parent, employee or former student who uses the school facilities and suffers actual injury would have standing to sue. This case is not moot.

The Merits

In a well-reasoned decision, Judge Gibson held that the school's display of the portrait violated the Establishment Clause. To satisfy the requirements of the Establishment Clause, the district court applied the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). The government practice at issue must 1) clearly reflect a secular purpose; 2) have a primary effect that neither inhibits nor advances religion; and 3) avoid excessive government entanglement with religion. *Id.* at 612.

The display here fails all three prongs of *Lemon*. The portrait is moving for many of us brought up in the Christian faith, but that is the problem. The school has not come up with a secular purpose. The portrait advances religion. Its display entangles the government with religion.

The district court pointed to several precedents. *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (school's posting of Ten Commandments improper because they are undeniably religious and because they were not integrated into any course of study); *Lee v. Weisman*, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (prayer at a graduation ceremony struck down in part because of the school's supervision and control of the ceremony). As in *Stone*, the portrait of Jesus is not integrated into any course of study, and like *Lee*, the school controls the picture.

These cases and *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), set out the general principles that we apply here. In *Plainwell Community Schools*, after analyzing *Marsh v. Chambers*, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983) (upholding "non-sectarian" legislative invocations), we rejected school invocations and benedictions "framed and phrased so that they 'symbolically place the government's seal of approval on one religious view'— the Christian view" and which "invoke . . . Jesus as the Savior." 822 F.2d at 1410. The support of sectarian prayers and pictures or similar religious acts and symbols by public schools violates the accommodation we made long ago with the religious history and traditions of our country. That accommodation requires "a neutral state designed to foster the most extensive liberty of conscience compatible with a similar or equal liberty for others." *Id.* at 1408.[2] The school has violated that principle.

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[2] In *Plainwell Community Schools* we explained the principle of accommodation as follows:

> From the beginning of the colonial period to the present, American churches have taken their various religious differences seriously, and under the Free Exercise and Establishment clauses taken together, we have generally accepted and settled on an accommodation: The concept of the equal liberty of conscience is our guiding principle. In our national and community life, we can never be sure whether our particular religious, sectarian and moral convictions will be in the majority or the minority. So as a diverse people we have rejected the

The defendants argue that the picture has meaning to all religions and that it is not inherently a symbol of Christianity. The case would be different if the school had placed representative symbols of many of the world's great religions on a common wall. But Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. Though the portrait, like school prayers and other sectarian religious rituals and symbols, may seem "de minimis" to the great majority, particularly those raised in the Christian faith and those who do not care about religion, a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case.

Finally, the defendants also argue weakly that the school hallway is a limited public forum. Judge Gibson properly rejected this argument and treated the case under standard Establishment Clause case law. The hallway is not a limited public forum because the school maintains the right to control what is posted there and does not offer space to other religions and causes. The focus must be on the preference of individuals, not the preference of the school itself. *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (there is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect").

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notion of a confessional state that supports religion in favor of a neutral state designed to foster the most extensive liberty of conscience compatible with a similar or equal liberty for others. To those who act or argue against this principle of equal liberty of conscience on grounds that their duty is to use the state in support of their particular beliefs, we answer that we cannot expect others to accept an inferior liberty. To those who say that the principle of equal liberty of conscience has the effect of rejecting the absolute nature of their religious beliefs, we reply that if any principle can be agreed to, it can only be that of an equal liberty of conscience for all. 822 F.2d at 1408.

The school's ownership and display of the portrait endorses the Christian religion and promotes it exclusively.

For these reasons, the defendants' motion to vacate, remand and dismiss is DENIED. The order of the district court requiring defendants to remove the portrait of Jesus is AFFIRMED.

GUY, Senior Circuit Judge, concurring.

Although I have labeled my participation in this decision a concurrence, as will readily become apparent, it is much more akin to a dissent. It is a concurrence only because I believe a case can be made that this result is dictated by the decision in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), as Judge Merritt concludes. I also join in the opinion following the old adage that the best way to get rid of bad law is to rigidly enforce it.[1]

As the majority notes, the "offending" religious artifact here is a reproduction of a famous portrait.[2] Copies of this painting can be found all over the United States as well as abroad. Most persons have seen a copy dozens of times in various and sundry locations, probably without paying it any particular heed. It no more conveys the notion of the "establishment" of a religion than a statue of Robert E. Lee in a park suggests we should dissolve the Union.

It has hung on the school wall for 30 years, and the only result that is evident is that the school population has become more religiously diverse over time as has our entire Country.

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[1] In his inaugural address on March 4, 1869, President Ulysses S. Grant said: "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."

[2] Is there no room under the Constitution for a famous portrait to stand on its own as a work of art? Some of the most famous and now priceless paintings in the world depict religious scenes, many of them using Christian figures and symbols. According to an article in the March 3, 1994, Chicago Sun-Times, Sallman's "Head of Christ" has been reprinted 500 million times.

For me at least, a discussion of "psychological damage" resulting from viewing this picture does implicate an "establishment" -- but not one of religion. What is established is a class of "eggshell" plaintiffs of a delicacy never before known to the law. I can well understand that someone (perhaps this plaintiff) in some sense could be offended by this portrait, but "injured" is another matter. In this multicultural world that young persons are entering today, I would hope our schools are turning out people with a little more resiliency than is evidenced here.

Earlier I said that "a case can be made" that the result here is dictated by *Lemon*, but that is as far as I would want to go with it. *Lemon* is much criticized and appears to be applied differently from case to case, or not applied at all. If the Supreme Court ever gets around to abandoning Lemon, and there is certainly significant impetus within the Court to do so, I would hope the new test would have a "de minimis" prong to it.

I do not mean to suggest that the "appropriateness" of this picture in the school is not a legitimate issue for discussion, but it ought to be resolved within the school context. In this age, this picture hanging alone might reflect some insensitivity to the diversity that is now America. But let us tackle the problem with some good old Yankee ingenuity — lobby for a course in comparative religions; put a picture of Martin Luther King on the wall; form a Zen Buddhist club; wear a t-shirt proclaiming the virtues of agnosticism; but, if I am permitted to use the expression, for heaven's sake, stay out of the courthouse and quit trivializing the Constitution!

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

No. 93-1248

DOTT WASHEGESIC, as Next Friend of ERIC PENSINGER;
ERIC PENSINGER,
with DOTT WASHEGESIC, as Next Friend of,
Plaintiffs-Appellees,

v.

BLOOMINGDALE PUBLIC SHCOOLS,
a MICHIGAN CORPORATION;
BLOOMINGDALE PUBLIC SCHOOL BOARD
Defendants-Appellants.

BEFORE: MERRITT, Chief Judge; GUY and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOTT WASHEGESIC, as Next Friend
to ERIC PENSINGER,

Plaintiff,

vs.

BLOOMINGDALE PUBLIC SCHOOLS,
a Michigan Corporation, and the
BLOOMINGDALE PUBLIC SCHOOL BOARD,

Defendants.

File No.: 4:92-CV-146

The deposition of ERIC PENSINGER, the plaintiff herein, taken under the provisions of the Federal Rules of Civil Procedure, before Gary B. Makarewicz (CSR2256), Certified Shorthand Reporter and Notary Public, at 520 Comerica Building, Kalamazoo, Michigan, on the 5th day of January 1993, commencing at 4:30 o'clock p.m., pursuant to notice.

APPEARANCES

FOR THE PLAINTIFF:

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BY: MS. SUSAN M. FALL

FOR THE DEFENDANTS:

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MR. MELTON: Good afternoon. My name is David Melton. You can call me just by my name. Don't call me Mr. Melton. That's my father's name. The process we're about to go through is called a deposition. Have you ever been through a deposition before?

THE WITNESS: No.

MR. MELTON: There's a few ground rules that we have to lay down. First of all, this proceeding is the case of Washegesic versus the Bloomingdale Public Schools. Your name is Eric Pensinger. Is that correct?

THE WITNESS: Uh-huh.

ERIC PENSINGER,

having first affirmed to testify the truth, testified on his oath as follows:

BY MR. MELTON: There's a few ground rules that we have to lay out before the deposition begins. If opposing counsel would care to go on the record, do you waive any difficulties as to notice under the court rules?

MS. FALL: Yes, if you'll do the same with respect to my notice.

MR. MELTON: Certainly.

EXAMINATION

BY MR. MELTON:

Q. This deposition is being taken under the Federal Rules of Civil Procedure, and it is for two purposes, one of which is called discovery; in other words, we're just trying to find out about the case that we're all involved in, and the other reason is to create a re-

cord so that we have actual testimony under oath. Now, you understand that you just took an oath?

A. Yeah.

Q. There are three primary rules. I could give you a whole lot more, but I find that three are sufficient in depositions that I ask that you remember. First of all, it is necessary that whenever you respond to a question which I lay out to you, that you respond verbally.

A. Right.

Q. In other words, no shaking of the head unless it's in conjunction with a verbal response, no nodding, no uh-huhs or huh-uhs because they are next to impossible for the transcriber to determine whether it's affirmative or negative. Do you understand that?

A. Yes.

Q. The second rule I would ask is that you please wait until I complete a question before you attempt to answer it because many times you, I'm sure, will feel you know where I'm going with the question and may try to answer the question, and that may not be where we're going at all. That will allow us to make a complete and accurate record of what your actual response to an actual question is and will be.

Thirdly, I would ask that if you do not understand a question, in other words, if I use a word that you do not know or I phrase a question in a manner which is confusing to you, that you would state that you do not understand the question as asked and attempt to help me identify what the problem is with the question so that your response would indeed be a fair and accurate representation

of what you believe the truth to be in this case. Do you understand that rule?

A. Yes.

Q. Do you understand everything that I have said up to this point?

A. Yes.

Q. Could you please state you name for the record?

A. Eric Scott Pensinger.

Q. Mr. Pensinger, where do you currently reside?

A. In Gobles, a Gobles address.

Q. And where do you currently attend school?

A. Bloomingdale Public High School.

Q. How long have you attended school at the Bloomingdale Public High School?

A. Since fifth grade, the high school since seventh.

Q. Where did you attend prior to fifth grade?

A. South Haven Schools.

Q. And what grade levels did you attend at South Haven Schools?

A. Kindergarten through fourth.

Q. And you are currently enrolled in what grade?

A. 12th

Q. And what's your current age?

A. 17.

Q. And your date of birth?

A. 4-17-75.

Q. Mr. Pensinger, have you indeed initiated litigation about a picture that is hanging in the hallways of—

A. Yes, I have.

Q. —that is hanging in the Bloomingdale Public School?

A. Yes, I have.

Q. How long have you been aware of the existence of that picture?

A. Since seventh grade, since I started school in the high school.

Q. How did you first become aware of the picture?

A. It's— I saw it.

Q. Has it been hanging in the same location as long as you recall?

A. Yes.

Q. Mr. Pensinger, I have noted that in your — there are some statements that you have made in this case already, that is to say your affidavit and the affidavit which you signed to initiate this litigation. Did you indeed sign under oath both of these documents?

A. Yes.

Q. I put before you a document. Does that look familiar?

A. Yes.

Q. I'd ask you to look it over and make sure that it's complete.

A. Yes.

MR. MELTON: And I'd ask this be marked for identification purposes as Defendants Exhibit One.

(Whereupon Deposition Exhibit Number One was marked by the court reporter for identification.)

MR. MELTON: If there is no objection from opposing counsel, I would ask that it be entered into the record.

MS. FALL: No objection.

Q. I will let you keep that in front of you because I do have a copy. In Paragraph Six under factual allegations, you indicate that the print of a painting of Jesus Christ is prominently displayed in the hallway of the Bloomingdale Public High School. What do you mean by the term, prominently?

A. It's pretty much in the center of the wall. I mean, there's not much else on the wall.

Q. When you say not much else, is there anything else on the wall?

A. There is a cardinal head and there is a display case, a small one that they put articles in sometimes.

Q. You indicate in Paragraph Number Six the print of a painting of Jesus Christ. What do you mean when you say Jesus Christ?

A. That's what I know it to be. I mean, I was raised Christian, so that's the picture that, you know, that I know to be Jesus.

Q. And basically what I'm asking is how is it that you have identified the person in that picture to be Jesus Christ?

A. I have seen other pictures, and they all resemble close to the same picture. Other people have acknowledged the same thing.

Q. You use the term Jesus Christ, what does that term or name mean to you?

A. At this point?

Q. I'm just asking what the name itself means.

A. It's the son of God, I guess, the Messiah.

Q. And you indicate that, Paragraph 11, it is contrary to your religious beliefs to be forced by government action to endure the presence of a picture of Jesus Christ in your public schools. Is that correct?

A. Yes.

Q. I'd like for you to explain to me what you mean by the term forced to endure the presence of the picture.

A. It's there. I can't, you know, I can't just walk up and move it. I mean, it's there, I see it. When I come into the school, I see it.

Q. You indicate in Paragraph 11 it is contrary to your religious beliefs. What religious beliefs are those?

MS. FALL: I'm going to object on the basis of relevancy. Mr. Pensinger's religious beliefs really aren't relevant in this action.

MR. MELTON: They certainly are. They were made relevant in this affidavit.

MS. FALL: Well, my objection's on the record.

MR. MELTON: Are you instructing the witness not to answer?

MS. FALL: No. You can answer that, Eric.

THE WITNESS: My religious beliefs?

Q. Sure.

A. I believe myself to be an atheist, borderline agnostic. I myself don't believe in a God; but if others choose to, that's their right. I believe if they be-

lieve strong enough, there is one for them, but there is not for me.

Q. I'd like for you to clarify that for me because I'm quite frankly, confused as to your answer. Do you believe in the objective existence of a God?

A. I don't believe in a God myself personally, no, not for me; but if someone chooses to, that's their right, the way I see it.

Q. Do you believe that there could be a God, but simply not within the realm of your experience?

A. Yeah.

MS. FALL: I'm going to object that that's not relevant and it's asking the witness to speculate. The question's not clear either.

MR. MELTON: The question is as to the distinction between an agnostic and an atheist, which he said he determines himself to be, and I'm attempting to determine what religious beliefs that Mr. Pensinger finds to be offended by this picture.

MS. FALL: You can answer the question if you understand it. If you don't understand, don't answer it.

THE WITNESS: I'm not totally sure I understand.

MS. FALL: Why don't you rephrase it.

Q. Do you believe that the existence of God may in fact be true, but it's simply outside the realm of your experience?

MS. FALL: I'm going to object on the basis of relevancy, but I'm not going to instruct you not to answer that. You can answer that.

THE WITNESS: I myself don't believe, I don't believe there is myself.

Q. Do you recognize the possibility of the existence outside of your frame of reference?

A. Yes.

Q. I'm interested in the wording of Paragraph Number 11 in which you talk about that you are being forced by government action to endure the presence of a picture. What government action are you referring to in that paragraph?

A. The school. It's a public school.

Q. And in what way? What government action is being undertaken by the school?

A. The school is keeping it up there. It's paid for by taxes. It's paid for by, you know, it's an extension of government.

Q. You're referring to it. What are you referring to?

A. The school, public school.

Q. And you indicate that you don't feel that you — you feel you are being forced to endure the presence of the picture?

A. Yes.

Q. What do you mean by that, to endure the presence?

MS. FALL: That's been asked and answered. I'm objecting. It's been asked and answered, but you can go ahead and answer.

THE WITNESS: I have to see it when I come into the school. I don't choose just to look away. It's there. I see it when I come in the school.

Q. You choose not to look away?

A. I don't see why I should have to look away.

Q. You indicate in Paragraph Eight that the Superintendent for Bloomingdale Public Schools has been requested to remove the print but to date has refused to do so. On what date or dates did you request the Superintendent of Bloomingdale Public Schools to remove the print?

A. I can't remember exact dates.

Q. Who are you speaking of when you say the Superintendent of the Bloomingdale Public Schools?

A. Mr. Hoke.

Q. Did you ask him verbally or in writing?

A. I didn't ask him. It was filed through the ACLU, and a complaint was filed.

Q. On what date did you ask the ACLU to contact Mr. Hoke?

A. I can't remember an exact date.

Q. Did you ask the ACLU to contact Mr. Hoke on your behalf?

A. Yes.

Q. On what date or dates did you ask the Bloomingdale Public School Board to remove the picture of Jesus from the hallway?

A. I don't know the exact date.

Q. Did you yourself make that—

A. No.

Q. — request? Other than correspondence issued by the American Civil Liberties Union, have you ever made contact with either the Superintendent or the School Board—

A. Not personally.

Q. — requesting removal of the picture?

A. No.

Q. Did you receive copies of the correspondence from the American Civil Liberties Union initiated on your behalf?

A. Yes.

Q. Do you know if your name was used on any of those pieces of correspondence?

A. I believe it was.

Q. Do you have any ideas as to the approximate time frames? You indicated you can't give me an exact date or dates. Do you have any idea as to the approximate time frames this correspondence was issued?

A. No, I don't.

Q. Was this correspondence that was initiated apparently on your behalf initiated on behalf of anybody besides yourself?

A. No. My mother because I'm only 17.

MS. FALL: Are you talking about correspondence or litigation?

MR. MELTON: Correspondence.

MS. FALL: I'm not sure he understood that question.

Q. Do you know the distinction between the two?

A. Can you clarify that?

Q. You indicated there was some type of communications that occurred between the American Civil Liberties Union and the Superintendent of the Bloomingdale

Public Schools and apparently the Public School Board?

A. Uh-huh.

Q. What do you understand that to be, correspondence?

A. Written paperwork, complaint.

Q. So in your mind, you don't distinguish between correspondence and initiation of a legal action in terms of that question?

A. Yeah, I do understand now.

Q. Did you request the American Civil Liberties Union to issue this correspondence on your behalf?

A. Yes, I did.

Q. Did your mother?

A. She had to sign for me. She agreed with me.

Q. By correspondence now I am speaking specifically of written letters and drawing a distinction between that and the complaint.

A. Yes.

Q. And does that alter your answer?

A. No.

Q. You indicate in Paragraph Number Ten the presence of the picture leaves you with the impression that the public school and its governing body endorse and encourage Christianity.

A. Yes.

Q. Can you point to any particular facts which support your proposition that the Bloomingdale Public Schools endorse, the Bloomingdale Public School and Board endorse Christianity?

A. The picture.

Q. Anything else?

A. Not with the school itself, no.

Q. So the sole basis for your complaint is that the picture is hanging on the wall and that constitutes an endorsement?

A. Yes.

Q. You indicate in Paragraph Ten that not only does the School Board and the public school endorse Christianity, but also encourages Christianity. Can you point to any particular instance or facts to support your proposition that it encourages Christianity?

A. The picture and the board meetings, the fact that they're bringing action back.

Q. I guess I'm not following your response. Because they are defending themselves in this litigation, that shows that they encourage Christianity. Is that what you're saying?

A. No. At the board meetings, the things that were said, things of that nature.

Q. Said by who?

A. As far as the community and things that have been said by employees of the school in newspapers and things.

Q. Now, you said members of the community?

A. Yeah.

Q. So you equate the actions of the Board and—

A. No.

Q. — school and it's governing body with the statements made by members of the community?

A. No.

Q. Can you give me particular statements that any member of the Board or any of the school's officers have made which will support your proposition that the Defendants are encouraging Christianity in the Bloomingdale Public Schools?

A. In a newspaper article that I read, a couple of them actually, I'm not sure if it was Mr. Dickerson or Mr. Hoke, they said that — something about it was part of our heritage, something about it's tradition and it's been there so long and things like that.

Q. You've used the word Christianity frequently throughout your complaint. What do you mean by Christianity? Are we speaking of a particular sect, are we talking about a general religion?

A. General religion.

Q. The picture that's hanging in Bloomingdale Public School, can you describe that for me?

A. What do you mean?

Q. What does it look like?

A. It's a man, long hair, a beard, a white robe on, a gold glowing behind his head, it's in a gold frame, it's about two and a half by three foot, three foot maybe, that's basically it, a white male.

Q. It's a portrait?

A. It's a portrait painting.

Q. Can you identify any particular religious teaching or belief that is taught by that picture?

A. I feel just seeing it is telling me something. There is no other religious pictures in there. They don't teach about it in any of the classes, but yet the picture is there; and to me and other people, that is a picture of Jesus. That's the way we take it.

Q. Do you recognize the historical existence of the character that's generally referred too as Jesus of Nazareth?

A. No, I don't.

Q. So your belief is that this individual did not exist in space or time?

A. Right.

Q. In any capacity?

A. Right.

Q. This I'm going to have to redirect again because I don't believe you really answered the question in terms of can you identify any particular creed or confession equated with that picture?

A. I'm not quite sure I understand.

Q. Can you identify any particular, let's say, denomination?

A. No.

Q. Can you identify any particular religious teaching, for example, the doctrine identified in that picture?

A. In that picture?

Q. Yes.

A. No.

Q. Can you identify any particular Christian teaching that is illustrated in that picture?

A. It's supposedly the man who taught all this, Christianity, whatever that's all about.

Q. You indicate in Paragraph 13, I'm going to try and avoid as much of the legal jargon as I can, but we have to get to the core of your complaint, that you believe that the display of the painting of Jesus

Christ in a publicly funded school is a violation of your rights secured by the First Amendment, specifically the Establishment Clause. Are there any other clauses that your rights are being violated under—

A. No.

Q. — under the Federal Constitution?

A. Not that I know of.

Q. And you also stated that you believe it's in violation of the Michigan Constitution Article One, Section Four. Is that correct?

A. Yes.

Q. On a day to day basis, what impact does that picture have on you?

A. I see it every time I walk past it. It's like— It's just an attraction to see it because it's always there. I look up and it's there, I notice it. It doesn't matter if I'm not trying to, I just notice it.

Q. Have you ever seen or observed, prior to the filing of this litigation, any type of religious observance to that picture in the Bloomingdale Public School?

A. Do you mean before I took action?

Q. That's correct.

A. By other students or —

Q. By anyone.

A. Some people, there was a petition that went around maybe a year or two years ago to take it down. A friend of mine sent a couple letters to the principal of the school.

Q. I don't think you understood the question. Did any type of religious observance, any type of— Do you know what the term genuflect means?

A. No.

Q. To kneel before the picture, any type of prayer to that picture before the filing of this litigation?

A. No.

Q. Is it a point of worship or veneration?

A. No, not before.

Q. Have you ever seen, even after, anyone praying to that picture?

A. I have seen them praying in front of it. The way people speak about it is as if it's this important.

Q. You say people. Who are you referring to?

A. There are people in the schools, some of the faculty that say they'll fight to keep it up, and just the way they speak about it and that they don't see a problem. They don't think it's endorsing anything.

Q. Do you equate that with some type of religious worship or veneration on the part of these teachers?

A. They must feel that it's a religious figure to them to say the things they say about it. They prayed before a board meeting, and there was people praying in front of it to keep it up, so that pretty much tells me.

Q. You keep mixing and matching. When you say people, who are we talking about? Are we talking about board members?

A. No.

Q. Are we talking about the principal?

A. No.

Q. Superintendent?

A. No.

Q. School officials?

A. No.

Q. We're dealing with members of the community?

A. Uh-huh.

Q. And did that sort of activity ever occur prior to your challenge of the picture, to your knowledge?

A. No.

Q. You have indicated in a lot of your answers that you feel or this is your opinion. You qualified quite a number of your answers in that manner, didn't you?

A. Uh-huh. Yes.

Q. Do you feel that you are more sensitive to this type of an issue than the average student in the Bloomingdale Public Schools?

A. Yes.

Q. You have heightened sensibilities about this particular issue?

A. Yes.

MS. FALL: I'm going to object. I don't know how Mr. Pensinger can testify as to what other students in the Bloomingdale Public Schools feel or what their beliefs necessarily are.

Q. You obviously have had an opportunity to discuss this with some of your classmates?

A. Some of my friends, yes. As far as—

Q. There's no question before you right now. Just answer the questions that are asked. Your attorney will have the opportunity to engage in the process of cross examination.

MS. FALL: He was answering the question and I'd ask that you let him finish his answer.

MR. MELTON: It was a question which you objected to:

MS. FALL: And then you asked him a question and he was answering it and you cut him off.

Q. Mr. Pensinger, can you distinguish between what the school endorses and what the school allows?

A. What do you mean?

Q. Well, for example, have you ever had a situation in which somebody happened to be wearing a t-shirt you maybe found personally distasteful at the school?

A. I myself, no.

Q. That other people might find personally distasteful?

A. Yes.

Q. Do you think that because the school merely allowed that, that therefore the school was endorsing it?

A. In a way, yes.

Q. So from your perspective, anything the school would allow, they would endorse?

A. Yes.

Q. You can't distinguish between the two?

A. Not that I can see, no.

Q. Do you believe that the school and School Board endorses every book that exists in the school library?

A. Yes.

Q. Do you believe then that all the books that could have religious connotations or be offensive to somebody on the basis of their religious group should be removed from the library?

A. No.

Q. Why not?

A. Because that's someone's choice to read that. That's not— You don't have to see that if you don't want to.

Q. Do you believe the same thing about the t-shirts, that the school should have the right to have the students not wear t-shirts that other students might find offensive?

A. Yes.

Q. Are you aware of a picture in the school's art room of the painting of the ceiling of the Sistine Chapel?

A. I've heard about it. I've never seen it personally, no.

Q. I take it that also would be unacceptable—

A. Yes.

Q. — to you, and you would seek its removal?

A. Yes.

Q. A name has been thrown around a little bit already, and I'd like to get into that. Who is Frank Hardester?

A. He's my best friend.

Q. Is he a student at the Bloomingdale Public Schools?

A. Not now, no.

Q. I'm sorry?

A. Not now he isn't, no. He graduated last year.

Q. Is he currently attending school anywhere?

A. Western.

Q. Western Michigan University?

A. Yes.

Q. Isn't it in fact true that much of what is going on now is the fallout of Mr. Frank Hardester's attempting to remove that picture previously?

A. In a way it is, yes, but not totally.

Q. Could you explain what you mean by that?

A. Well, in the beginning, he's a year senior than I was, and he had written a letter when he was in tenth grade, and I didn't even know that it was illegal, and he wrote a letter and I got to talking to him about it, and then eventually he wrote a second one, then he got in contact with the ACLU and talked to someone, and I was going to be a witness for him to take the suit, and they said it would be better for someone who was still in the school seeing as how he was graduating, so I said I would do it because I had been in it with him, and so that's where I took over and he was going to be a witness for me.

Q. Give me the approximate time frames for the series of events that you just described.

A. Towards the end of last school year is when all — when we basically started talking to the ACLU, towards the end of the school year.

Q. So originally it was Frank Hardester that was anticipating being a plaintiff in this litigation?

A. Yes.

Q. And you would have been a witness?

A. Yes.

Q. In the entire educational context of the school, by that I mean the school taken as a whole, can you identify anything else which would give you the impression that Christianity is being endorsed or otherwise sponsored by the Bloomingdale Public School or the Bloomingdale Public Schools?

A. No.

Q. Other than that picture of Jesus?

A. No.

Q. One of the issues which may come up in this litigation in the Federal Court here would be the issue of what type of remedy would be appropriate. Is there anything that could be done by the School Board short of taking the picture down which would communicate to you the view that the School Board is not seeking to sponsor or endorse Christianity?

A. No.

Q. So no inclusion of this picture in a collection of others would suffice?

A. No.

Q. No type of a disclaimer or notice that this is not an endorsement would suffice?

A. No.

Q. No act that the School Board could take short of taking the picture down would suffice?

A. No that I can see, no.

Q. Are you familiar with the school's multicultural mandate?

A. No.

Q. Those words don't mean anything to you?

A. I don't know anything about it.

Q. Are you familiar with the concept of outcome based education?

A. No. I don't understand these terms.

Q. That's fine. On December 21st, you signed an affidavit which was attached to your reply on the issue of the preliminary injunction?

A. Yes.

Q. Have you seen that document before?

A. Yes.

(Discussion held off record.)
(Subsequent to a short break, the following transpired:)
(Whereupon Deposition Exhibit Number Two was marked by the court reporter for identification.)

Q. I would just ask you to review and make sure that the copy that you have before you is accurate and complete in accordance with what's already been marked as Defendants Exhibit Two. Obviously you'll be working off of one and I'll be working off another.

A. Yes.

MR. MELTON: If there is no objection, I would ask that Defendants' Exhibit Two, which is the affidavit of Eric Pensinger, be entered into the record.

MS. FALL: No objection.

Q. Eric, this is an affidavit for purposes of the reply brief in this case, I believe. Is that in fact your signature at the end of the document?

A. Yes.

Q. In Paragraph Number Four, which is on page two there, you describe the physical location of the picture that you indicated is Jesus Christ?

A. Yes.

Q. Could you describe for me just generally from memory what's right there, what's in the immediate vicinity as you are standing there if you are looking at that picture?

A. Looking straight at the picture?

Q. Sure. Do a 360 for me. Tell me what's all around it.

A. There is a main office that's all glass windows, there is a trophy case, there is bathrooms, drinking fountains, a phone, some lockers, the main doors, and it's basically at the T of hallways.

Q. It's where two hallways intersect?

A. Right.

Q. And what is in this trophy case that you described?

A. There's trophies, some plaques, I believe there's some basketballs in there with names on them, stuff like that from games and things.

Q. Pictures of winning teams?

A. I'm not sure.

Q. That's a perfectly fair answer if you don't know the answer to a question, as your attorney I'm sure already told you, and I will tell you. Are there any bulletin boards in the vicinity of the picture?

A. There is a small one that's more like a display case than a bulletin board that's maybe ten feet away from the picture on the same wall towards the gym doors. It's not really a bulletin board. They just put reminders up for things once in a while. Sometimes it's empty.

Q. On the same wall as the copy of the mascot of the school?

A. Yeah.

Q. And that would be—

A. In between the two.

Q. And what would be that mascot?

A. Cardinal head.

Q. When we talk about a cardinal, we're talking about a bird and not a religious figure?

A. Yeah.

Q. Are there frequently other signs posted on that wall?

A. Yeah, there is, like for bake sales and stuff like that?

Q. In fact, I think on one of the exhibits that was attached to the initial complaint, it had two items on it, a Garfield poster, not the president, the cat?

A. Right.

Q. And something about a tuxedo?

A. Yeah, for, I think it was prom.

Q. Sure. It's not unusual to have things posted on that wall?

A. Yeah, small posters.

Q. Ever have school banners for like pep rallies on that wall?

A. Not on that wall I don't think, no. For games and like homecoming, they assign us halls, and there's usually not one there.

Q. Do you know if there is any, other than the two items we have mentioned, are there any other religious articles at the school?

A. Not on any walls that I know of, but we have classrooms and I haven't been in all of them, so—

Q. You only speak of what you have knowledge?

A. Right.

Q. So you don't have any knowledge of any other religious articles?

A. No, I don't.

Q. Is there any other art in the school?

A. In some classes, yes. There's paintings in the history room, there's George Washington and presidents. In the law room, there is a picture of the Michigan flag, and I think there's another picture of George Washington; but as far as any other classes, most classes don't, no.

Q. Maps, that sort of thing?

A. Yeah, maps and maybe like in the biology room, pictures of human anatomy, things like that.

Q. But nothing that would be considered art work?

A. No.

Q. How many, and I'm not going to ask you for an exact number, I'm not going to hold your finger to the fire if you get it wrong, approximately how many pieces of what you would call art are there in the school?

A. As far as the rooms that I know, that I have been in on a regular basis, I'd say between ten and 15, as far as small murals and things like that go.

Q. And in that category, would you include, I just want to narrow it down, would you include portraits and that sort of thing?

A. Most of what I'm talking about is painted directly on the wall, like in the gym, there's a couple pictures of cardinals and like in the history room, those pictures of Washington and Martin Luther King, those are all painted directly on the walls.

Q. The Reverend Martin Luther King?

A. Yes.

Q. Do you find him to be a religious figure?

A. Not the way he's taught, I don't find him to be that way, no.

Q. So you don't have any objection to the Reverend Martin Luther King being on the wall?

A. No, I don't.

Q. And you do have a problem, though, with Michelangelo's painting of the Sistine Chapel?

A. Yes.

Q. And the picture of Jesus?

A. Yes.

Q. Any other pictures that you find offensive?

A. No.

Q. You indicated approximately ten to 15 pieces of art in the school over all?

A. Right.

Q. That you are apparently familiar with?

A. That I know of, yes.

Q. And of those ten to 15 pieces of art, would you include the anatomical models or the maps or anything else that we discussed—

A. No.

Q. — in that number?

A. No.

Q. So these are things actually suitable for framing, I suppose?

A. Not really, no.

Q. Not that good?

A. No, most of them aren't really that—

Q. You indicate a picture of Martin Luther King was painted on the wall?

A. No.

Q. A picture of George Washington.

A. Yes.

Q. Are there any pictures of George Washington that are framed pictures?

A. No. Most of the pictures are painted just directly on the wall by a couple of the teachers, so—

Q. You indicate that in your opinion, Paragraph Number Five, the picture is not part of any school curriculum nor does it serve any academic purpose. Can you define for me what you mean by school curriculum?

A. They don't teach it, that I know of. I've never had anything taught to me about Jesus in any of my classes.

Q. And you stated it does not serve any academic purpose. What do you mean by academic purpose?

A. We don't get grades or anything for writing reports on it or anything like that. It doesn't— It's not part of a class or anything.

Q. And your understanding is that that's the limitation of academics that has occurred in the Bloomingdale Public Schools?

A. I'm not much of an academic person, so I can't—

Q. When did you first start having questions about the legality of this picture?

A. In ninth grade is when the first questions to myself or to a teacher came up.

Q. And how did those questions comes up?

A. In ninth grade, we had a law class that's a required class, and we learned about the Constitution and civil rights and all that, and it was a question that came up from more than just one person about the picture in the hallway, and we all got the same response.

Q. Who was it that was instructing the class?

A. Mr. Weeks.

Q. And do you know what year that would have been?

A. 90 something.

Q. '89, '90?

A. I believe so, yeah.

Q. In Paragraph Number Seven, you indicate that you learned about this principle of separation of church and state?

A. Yes.

Q. And that you were not aware that it was wrong for a public school to display a picture of Jesus Christ in

such a manner. What do you mean by the word wrong?

A. The way I saw it is that when I first saw it, I thought that there was nothing wrong with it; and after I took the class, I realized that it was, you know. I figured that because the school had it there, in a way they were endorsing it, so that made it illegal for a division of state, being the school, to have that there, as being wrong.

Q. I guess what I'm getting at is you used the word to define the word. You didn't help us. What do you mean by the word, wrong?

A. That it shouldn't be there, that the picture shouldn't be there.

Q. I'm just curious about your choice of words. That's what I'm trying to get at. You didn't say you thought it was unconstitutional or illegal, you just said it was, wrong?

A. Right.

Q. You indicate in Paragraph Ten the display of the picture of Jesus Christ in a public school which you attend leaves you with the impression that your school and its officials endorse and are encouraging you to practice Christianity.

A. Yes.

Q. Can you point to anything in particular which, any facts to support that statement other than the picture itself?

A. No.

Q. What do you mean when you say that the school and school officials are encouraging you to practice

Christianity? What in particular are they compelling or coercing you to do in any way?

A. See the picture. That's the way I feel.

Q. So you feel that exposure to this picture has a coercive effect on you?

A. Yes.

Q. You also indicate that the display of the picture makes you feel as though you are not accepted by your school or its officials because of your religious beliefs?

A. Yes.

Q. Can you point to any facts to support that statement?

A. Because I feel that in a way, the school thinks that because the picture is there, that Christianity is right. I feel that because I'm not Christian, I feel out of place there, you know, as far as the Board goes and things like that. I just feel out of place.

Q. In my question, I asked you about particular facts, the same thing in the previous question, and you keep telling me what you feel, and I'm asking if there has been any action or facts to support your conclusion.

A. No.

Q. In other words, these beliefs, both as to your impression of endorsement and encouragement to practice Christianity and the question as to whether or not you feel accepted by the school and its officials, you can't point to any facts or any circumstances or any incidents which would support those conclusions other than the picture itself?

A. No.

Q. Do you know the difference between the term objective and subjective?

A. Objective, I believe I do.

Q. Let's make it real clear for the record. What's your understanding of the difference between the two?

A. Subjective is where you give into things or you let someone be objective over you. Objective is where you voice your opinion of something.

Q. Let's back up a little bit. Can you point to, other than your own feeling or impression, can you point to anything, any facts, anything that is observable or anything that is measurable which would indicate to you that you are a lesser member of the community because of this picture?

A. Community or school?

Q. Let's go with the school.

A. No.

Q. In Paragraph Number 12, you state that the display of the picture leaves you with the impression that the officials at your school believe that there is something wrong with you because you do not worship Jesus Christ or believe that he is a divine being. Is that correct?

A. Yes.

Q. Once again, can you point to anything that's observable, anything outside of your own impressions or your own feelings to support this proposition other than the fact that the picture is just hanging there?

A. No.

Q. In Paragraph Number 13, you state the school doesn't permit students to post items on any school hallway

wall unless the items are first approved by the administration.

A. Yes.

Q. Where did you get that understanding?

A. From when we do posters for homecoming or winterfest. Everything has to be appropriate; and if there is something up there that the school doesn't agree with, they take it down.

Q. Can you draw a distinction between that which is approved, allowed, or removed?

A. What do you mean?

Q. Can you draw a distinction in your own mind between that which the school approves, that which the school allows, and that which the school removes?

A. I think that what the school allows is what — what the school allows is what they consider is okay, and what they take down or get rid of they don't agree with.

Q. So in your mind at least, there is no middle ground between what the school endorses and what the school censors?

A. I don't believe so, no.

Q. Again, in Paragraph 16, you indicate that other students and you have indicated to the principal of your school that you believe that the display of the picture of Jesus Christ is wrong.

A. Yes.

Q. Do you have any import to the word wrong other than what we discussed in the previous questions?

A. No.

Q. Paragraph 17, you state that you are aware that the School Board and school Superintendent have been requested to remove the picture?

A. Yes.

Q. But in this paragraph, you don't state that you asked. Do you draw a distinction between the two?

A. I don't understand the question.

Q. Previously you testified that you felt that the American Civil Liberties Union was acting on your behalf or at your request?

A. Yes.

Q. In this paragraph, you seem to be indicating that you are aware that the School Board and school Superintendent have been requested.

A. On my part.

Q. The reason I'm asking is there is a distinction here. There is a difference. This is spoken in what's called the passive voice.

A. Yes.

Q. It's not I have requested.

A. Right.

Q. I was just wondering if there was a reason for that.

A. Not that I know of.

Q. You did sign this?

A. Yes.

Q. And you are aware of what it says?

A. Yes.

Q. And what it means?

A. Yes.

Q. I guess I'm not understanding your response not that you are aware of. What did you mean by that?

A. I mean I am aware that they were contacted on my part.

Q. In the last paragraph in your affidavit, you state that your hope is that as a result of the lawsuit, that the public school will be prohibited from displaying the picture of Jesus Christ?

A. Yes.

Q. You're speaking now specifically of that one picture hanging in the hallway?

A. Yes.

Q. And are you speaking in that paragraph of any display whatsoever?

A. Yes.

Q. For any purpose?

A. Yes.

Q. In some of the press that came out after the filing of the lawsuit, particularly talking about an AP story that ran on October 30th, your attorney indicated that you have one of two choices, you can either stop going to school or you can attend school and be forced to view every day a figure, religious figure who you do not choose to worship. Is that really the way you view the current situation?

A. Yes.

Q. Mr. Pensinger, is it a realistic appraisal that if this picture is not removed from the walls of the Bloomingdale Public Schools, that you will cease attending school there?

A. Probably not, no.

Q. We have run through quite a series of questions related to your views, how you feel about these many issues, and this is just sort of a capping question, just to make sure I didn't miss anything. Can you point to any facts, I'm not talking about feelings or impressions, but any facts which support your belief that you are in any way being discriminated against or in any way being coerced or being encouraged to practice Christianity other than the silent witness, if you will, of that picture hanging on the wall?

A. No.

Q. What is it that you feel that picture is coercing you to do?

A. I feel that when I see it, that it's telling me that I am wrong for the way that I believe and that I should believe the way, you know, as Christians. That's the way I feel, when I see the picture, that I am wrong in my beliefs.

Q. And you indicated previously that you think you probably have heightened sensibilities about that than what the average student would have?

A. Because I'm so close to this now, yes, I think I do.

MR. MELTON: I think that's it for me.

MS. FALL: I just have a couple questions.

EXAMINATION

BY MS. FALL:

Q Picking up on where Mr. Melton left off, Eric, he asked you if you felt you had heightened sensibilities. To your knowledge, are there other students who also feel that the picture should be taken down?

A. Yes.

Q. Do you believe that you are being unreasonable or irrational with respect to your desires to have the picture taken down?

A. No.

Q. Do you believe that you are being hypersensitive or oversensitive with respect to the picture?

A. No.

Q. You testified that you felt that the display of the picture means that you are wrong if you don't believe in Christianity. Do you believe that— Does the display of the picture leave you with the impression that the school is sending that message to you?

A. Yes.

MS. FALL: I don't have any further questions.

MR. MELTON: I'll try and wrap it up then.

EXAMINATION

BY MR. MELTON:

Q. Once again, you came back to all of these impressions and feelings. Once again, your impression regarding whether or not the school is endorsing Christianity, can you point to anything, anything other than your feelings about this issue to support that proposition?

A. I just feel that because the school has it there, that that's the way they feel, that's their belief.

Q. No one has ever articulated or stated to you that in so many words?

A. Not on the Board or the faculty, no.

Q. You indicated once again that you feel, so I take it outside of this area of impression or feelings, you can't point to any particular facts to support your proposition?

A. No.

Q. You were asked if you were hypersensitive about this issue, and you answered that question differently than when I asked if you had heightened sensibilities about this issue.

A. I just feel that I am more sensitive because I am so into the situation now. I'm closer to everything that's going on, so I feel that I'm closer than other students.

Q. I guess what I am focusing in on is as far as the average student, he wouldn't necessarily have your perception on this issue, would he?

A. No.

Q. Mr. Pensinger, the issue of heightened sensitivity, I used the term heightened sensibilities, is it exposure to religious materials in general or Christianity in particular that you find offensive?

A. It's religion period.

Q. Is that sensitivity exclusively in the areas of government involvement or is it religious, objection to religious materials generally?

A. It's government involvement because, I mean, I have friends whose parents have things like this and they don't offend me because that's their home; but at a public school, at my school, it offends me.

Q. So it's the context in which the religion occurs rather than the religion itself?

A. Yes.

Q. So, for example, you wouldn't find it similarly objectionable in a church or—

A. No.

Q. — home? Do you attend church?

A. No.

Q. Have you recently?

A. No.

MS. FALL: I'm going to object, that's irrelevant, but you can answer.

Q. When is the last time that you recall attending?

A. At least three years ago.

MS. FALL: I'm going to continue my objection. I don't mean to keep interrupting you.

MR. MELTON: Your continuing objection is on the record.

MS. FALL: Thank you.

Q. It was at least three years ago—

A. Yes.

Q. — that you attended your own church or any church?

A. I've never really had my own church except when I was real young when my grandmother made the grandkids go to church.

Q. And so you haven't, to use the old expression, you haven't darkened the door of a church in three years?

A. At least, yes.

MR. MELTON: I have nothing further.

(Subsequent to a short break, the following tranpired:)

MR. MELTON: I have one more question.

REEXAMINATION

BY MR. MELTON:

Q. Eric, do you think a rational, ordinary, average student at Bloomingdale High School when looking at that picture is left with the impression that the school endorses Christianity?

MR. MELTON: I have to object to the question. It calls for expert testimony from a lay witness. You're asking what the capacities are of teenagers, which is clearly in the realm of at least psychiatry, if not psychology.

Q. Eric, is it your position that an average rational student attending that school when looking at the picture would be left with the impression that the school endorses Christianity?

MR. MELTON: Same objection, and it calls for speculation.

Q. You can go ahead and answer.

A. Yes.

MS. FALL: I have no further questions.

(Deposition concluded at 6:00 p.m.)

CERTIFICATE

STATE OF MICHIGAN

ss:

COUNTY OF KALAMAZOO

I, Gary B. Makarewicz (CSR2256), Certified Shorthand Reporter and Notary Public in and for Kalamazoo County, Michigan, do hereby certify that the foregoing deposition of Eric Pensinger was taken before me at the time and place hereinbefore set forth; that said witness was first duly sworn by me to testify the truth and nothing but the truth, and thereupon was examined and testified as in the foregoing deposition appears;

That this deposition was taken in shorthand and thereafter transcribed by me, and that it is a true and correct transcript of my original shorthand notes.

I further certify that I am not counsel for or related to either of the parties to the foregoing entitled cause, nor employed by them or their attorneys; neither am I interested in the subject matter or outcome of the foregoing cause.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of January, 1993.

Notary Public in and for
Kalamazoo County, Michigan

_____

My commission expires
July 20, 1993.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 93-1248

DOTT WASHEGESIC, as next friend of Eric Pensinger;
ERIC PENSINGER, with Dott Washegesic as next friend of,
Plaintiffs-Appellees,

v.

BLOOMINGDALE PUBLIC SCHOOLS,
a Michigan corporation;
BLOOMINGDALE PUBLIC SCHOOL BOARD
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

AFFIDAVIT OF ERIC PENSINGER

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E - 2

AFFIDAVIT OF ERIC PENSINGER

STATE OF MICHIGAN

ss.

COUNTY OF KALAMAZOO

Eric Pensinger being duly sworn deposes and states as follows:

1. That I am over the age of eighteen years and if called upon to do so, could testify completely to the contents hereof.

2. That I graduated from Bloomingdale Public High School in May of 1993.

3. That even though I have graduated, I still have many reasons to return to the high school, to wit:

   A. I am dating a young woman who is still a student at Bloomingdale High School. She is on the volleyball team and I intend to return to the high school to watch her volleyball games. The volleyball games will take place in the gymnasium outside of which the disputed picture of Jesus is displayed.

   B. I will return to Bloomingdale Public High School to watch other athletic events including basketball and football games. The basketball games will take place in the gym outside of which the disputed picture of Jesus is displayed.

   C. I will return to attend dances and other functions. In fact, I have been a disc jockey at the dances in the past and hope to continue to do that in the future.

   D. I will attend graduation ceremonies which are conducted at the high school.

4. Most of the activities I will attend are conducted in the school gymnasium. The picture of Jesus is displayed directly outside of the main entrance to the school gymnasium. In order for me to enter the gymnasium I will be forced to view the picture unless I take an inconvenient detour and enter the gymnasium at the back of the school.

5. Since I instituted this action, I have received many negative responses from other students and members of the Bloomingdale community, including:

   A. At the first school board meeting at which this lawsuit was discussed, I was screamed at by the wife of the school board president and told by others that I would go to hell.

   B. I have been called many names by students and members of the community, including "punk" and "devil worshipper."

   C. One young woman at a board meeting told me that I "should be shot."

   D. I have been told I should be "thrown in jail."

   E. I have received many letters in which I have been criticized and called names.

   F. There have been many letters to the editor of one of our local newspapers which have been critical of me and of the position I am taking. That paper carried a political cartoon, a copy of which is attached, in which I was depicted as a wild eyed. anti-patriotic fanatic. This cartoon ran in the Kalamazoo Gazette on Friday, November 20, 1992.

   G. My physical safety has been threatened when I have been out in public.

6. I am fearful that if the judgment of the District Court is vacated, a message will be sent to the school and members of the community that my position was wrong and that the display of the picture of Jesus in a public high school is legal.

7. I did not file this action sooner because I did not have the funds with which to pay an attorney. It was not until the summer of 1992 that I discovered that there was an organization available to me that would help me pursue my rights and not require a fee for its services.

Further deponent sayeth not.

Dated:_____1993 _____

Eric Pensinger

STATE OF MICHIGAN

ss

COUNTY OF KALAMAZOO

Subscribed and sworn to before me this 20th day of July, 1993.

/s/ Susan M. Fall
Susan M. Fall, Notary Public
Kalamazoo County, Michigan
My commissions expires:
March 13, 1994

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

DOTT WASHEGESIC, as Next Friend to
ERIC PENSINGER,

Plaintiffs,

v.

BLOOOMINGDALE PUBLIC SCHOOLS,
a Michigan Corporation and the BLOOMINGDALE PUBLIC SCHOOL BOARD,

Defendants.

CASE NO.: 4:92-CV-146
BENJAMIN F. GIBSON
CHIEF, U.S. DISTRICT JUDGE

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AFFIDAVIT OF DR. WILLIAM A. DECKER, M.D.

STATE OF MICHIGAN

ss.

COUNTY OF KALAMAZOO

Dr. William A. Decker, M.D., being first duly sworn, deposes and states:

1. That I am a Doctor of Medicine board certified in Psychiatry and Neurology.

2. That I obtained my Bachelor of Science degree from Western Michigan University in 1948, where I majored in Chemistry and Biology.

3. That I obtained my Doctor of Medicine degree from Wayne State University in 1952.

4. That from 1952-1953, I was trained in a Rotating Internship at the City of Detroit Receiving Hospital.

5. That from 1953-1955, I was trained in a Psychiatric Residency at the Kalamazoo State Hospital (now the Kalamazoo Regional Psychiatric Hospital).

6. That from 1955-1956, I was trained in a Psychiatric Residency at the Lafayette Clinic, in Detroit, Michigan.

7. That in 1959, I was Board Certified as a Diplomat of the American Board of Psychiatry and Neurology.

8. That my professional experiences are more fully discussed in my *Curriculum Vitae*, attached.

9. That I have reviewed pertinent materials in this case, including Plaintiff's *Verified Complaint*, *Affidavit* and *Deposition*.

10. That, in my opinion, Eric Pensinger's reaction to the print of Jesus is atypical of that which would be expected of a "reasonable observer" of his age.

11. That the conclusion set forth in paragraph 10 above, is supported by a theoretical perspective known as "cognitive development".

12. That the "cognitive development" perspective is dominant in the field of developmental psychology and is supported by the bulk of evidence from systematic research.

13. That the "cognitive development" perspective focuses on states of development; sensory-motor state (birth-2 years); pre-operational thought (2-7 years); concrete operations (7-11 years); and formal operations (11-15 years).

14. That individuals in the concrete operations stage (7-11 years), although quite logical in their approach to problems, can only think in terms of concrete things that they can handle or imagine handling.

15. That individuals in the formal operations stage (11-15 years) are able to make comparisons and cross-comparisons, and think in abstract terms and test their ideas internally with logic. As a result, they can go beyond the here and now to understand things in terms of cause and effect, to consider the possibilities as well as the realities and to develop abstract concepts.

16. That Eric Pensinger, as evidenced in his *Verified Complaint*, *Affidavit* and *Deposition*, illustrates an inability or unwillingness to engage in formal operations level thinking, by:

    A. focusing upon one print within the overall educational context of the school;

    B. absolutizing his subjective impression of that print;

C. viewing the print as an endorsement by the school of every teaching of the individual depicted;

D. being unable to view and distinguish choices in the spectrum of alternatives, i.e., sponsoring the print, allowing the print, and censoring the print;

E. being unable to admit that the school does not endorse everything which it does not censor in the context of the library, students' t-shirts, etc.;

F. being unwilling to accept any alternatives to the removal of the print in order to ease his concerns that the school is creating the impression of governmental sponsorship, i.e., the posting of additional pictures, a disclaimer, etc.;

G. being unable to point to any objective observable facts or actions, other than the existence of the print in the school, in support of his subjective feelings and impressions that:

1. Christianity is being endorsed by the Bloomingdale Public Schools;
2. Christianity is being sponsored by the Bloomingdale Public Schools;
3. he is being encouraged to practice Christianity by the Bloomingdale Public Schools;
4. the mere exposure to the print itself has a coercive effect upon him;
5. he is not accepted by the Bloomingdale Public Schools and its officials;
6. officials at the school believe that there is something wrong with him because he does not worship Jesus Christ or believe that he is a divine being;

7. he is a lesser member of the school because of this print; and

8. he is being coerced or being encouraged to practice Christianity; and

H. his inability or unwillingness to tolerate viewpoints with which he disagrees.

17. That Eric Pensinger, or any objective observer of secondary school age, should be able to understand that a school does not endorse everything it does not censor.

18. That Eric Pensinger, or any objective observer of secondary school age, would normally be involved in a post-latency age identity crisis, usually characterized by introversion and self-orientation.

19. That Eric Pensinger, or any objective observer of secondary school age, would normally not be concerned with a passive print unless it was forcibly called to their attention, apparently in this case, by one Eugene Hardester, Eric's best friend.

20. That Eric Pensinger, engages in absolutistic reasoning, more appropriate of a concrete operations stage of development that the formal operations stage, when he applies one set of standards to the print of Jesus, but another to the depictions of George Washington and the Reverend Martin Luther King, Jr. (i.e., does the depiction of George Washington in the Bloomingdale Public Schools mean that the school endorses slavery, because President Washington practiced it? Or does the depiction of the Reverend Martin Luther King, Jr. in the Bloomingdale Public Schools mean that the school endorses his Christian faith, his teachings at the Ebenezer Christian Church, the positions of the Southern Christian Leader-

ship Conference, his positions on the Vietnam War, pacifism, non-violent civil disobedience, etc.?)

22. That the objective observer of secondary grade level, when confronted with history and entirety of the circumstances, derived from the overall educational context, as recounted by Eric Pensinger, would conclude the following:

    A. The Bloomingdale Public Schools and its officials do not endorse everything which they do not censor;

    B. The Bloomingdale Public Schools and its officials do not endorse Christianity;

    C. The Bloomingdale Public Schools and its officials do not encourage Christianity;

    D. The Bloomingdale Public Schools and its officials do not sponsor Christianity;

    E. The Bloomingdale Public Schools and its officials do not ostracize or communicate non-acceptance because of one's religious beliefs;

    F. The Bloomingdale Public Schools and its officials do not communicate a message to non-adherents of Christianity that there is something wrong with them because they do not worship Jesus Christ or believe that he is a divine being;

    G. The Bloomingdale Public Schools and its officials do not communicate a message to non-adherents of Christianity that they are lesser members of the school;

    H. The Bloomingdale Public Schools and its officials do not coerce Eric Pensinger, psychologically, or any other way, within the normal meaning of that word, by the mere presence of the print in the school;

I. The print itself is a valid recognition of Jesus, a first century historical figure, a teacher and rabbi, who taught pacifism and non-violence, and whose teachings were implemented by the Reverend Martin Luther King, Jr.; and

J. The print, in like manner to the depictions of George Washington and the Reverend Martin Luther King, Jr., is a depiction of individuals of historic prominence who has contributed to civilization.

23. That it is particularly significant that Eric Pensinger admits that he has "heightened sensibilities" on this issue and that the average student would not necessarily have his perception on this issue.

24. That, because the print depicts Jesus in portrait style, rather than still-life (depicting a religious scene, i.e., the Last Supper, the Crucifixion, the Resurrection, the Ascension, miracles, etc.), any religious content is subjective, (i.e., inherent in the view themselves), rather than in the print.

25. That the inclusion of an explicit disclaimer or the inclusion of the print among other similar pictures of historical notables would eliminate any subjective *imprimatur* of governmental endorsement as viewed by an objective secondary school student.

26. That if called as witness he would competently testify to the facts set forth herein.

/s/ William A. Decker, M.D.
Dated: January 25, 1993. William A. Decker, M.D.

Subscribed and sworn to before
me on January 25, 1993.

/s/ David R. Melton
David R. Melton, Notary Public,
Kent County, Michigan,
acting in Kalamazoo County,
Michigan
My Commission Expires:
April 20, 1996

No. 94-1383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BLOOMINGDALE PUBLIC SCHOOLS, a Michigan Corporation;
BLOOMINGDALE PUBLIC SCHOOL BOARD,

Petitioners,

—v.—

DOTT WASHEGESIC, as next friend to Eric Pensinger,
ERIC PENSINGER, with Dott Washegesic as next friend of,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Did the lower courts err in their fact-based determination that the prominent display of a portrait of Jesus Christ in a public secondary school, unrelated to any course or curriculum and not part of a larger secular display, violates the Establishment Clause?

II

Did the lower courts correctly hold that respondent continues to have standing to challenge the constitutionality of a religious display with which, after his graduation, he continued to have frequent and unwelcome contact?

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STATEMENT OF THE CASE

The religious display declared unconstitutional in this case is a two-by-three foot portrait of Jesus Christ, which is prominently displayed in a public secondary school hallway. *See* District Court Opinion, Pet. App. at A-3. It is located at the intersection of two main hallways just outside the principal's office, near the gymnasium. *See id.* Almost all of the students who attend the school, which includes the seventh through twelfth grade, pass by the portrait at least once a day. *See id.*

The portrait is not part of a larger display, and it is not placed in any historical, ethical, or artistic context. *See id.* at A-8. School officials control the content of what is placed on the school walls; they are not freely available for communication. *See id.* at A-14, n. 16. School officials were unable to assert *any* purpose, let alone a secular one, for the display of the portrait. *See id.* at A-7. The District Court specifically found "that any reasonable observer would find that the picture of Jesus transmits a religious message." *See id.* at A-12.

Respondent Eric Pensinger was a 17-year-old senior at the school when this action was filed. He graduated from the school in June 1993, though the Sixth Circuit found that he continues to visit the school to attend various events, and comes into direct and unwelcome contact with the display each time he is in the hall. *See Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679, 681, 682-3 (6th

Cir. 1994); Pet. App. at B-3 to B-6.[1]

On the merits, the District Court held that the religious display was unconstitutional. The Sixth Circuit, in a unanimous decision authored by Chief Judge Merritt, upheld the district court in all respects, stating:

> The case would be different if the school had placed representative symbols of many of the world's great religions on a common wall. But Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive.

See Washegesic, 33 F.3d at 684; Pet. App. at B-8.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS CORRECTLY APPLIED THIS COURT'S PRECEDENTS IN MAKING THE FACT-BASED DETERMINATION THAT THE DISPLAY IN A SECONDARY PUBLIC SCHOOL OF A PORTRAIT OF JESUS CHRIST WHICH IS UNRELATED TO ANY COURSE OR CURRICULUM VIOLATES THE ESTABLISHMENT CLAUSE

Despite Petitioners' attempt to create new factual and legal issues, the issue presented here is purely contextual: whether the District Court erred in applying *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), in determining the

---

[1]No standing issue was raised in the District Court. Petitioners raised a standing issue in the Sixth Circuit by motion and supported with affidavits, arguing that Pensinger's graduation from the school made his claim moot. Respondents filed a response, including an affidavit of Mr. Pensinger. The Court of Appeals, based upon the undisputed affidavit testimony of Pensinger, made factual findings that Pensinger continued to come into repeated, direct and unwelcome contact with the portrait.

constitutionality of a portrait of Jesus Christ, which is neither related to any course or curriculum nor part of a larger secular display, and is prominently placed in a public secondary school building. The District Court, as affirmed by the Court of Appeals, undertook a comprehensive and thorough analysis of Establishment Clause cases, particularly this Court's decisions in *Stone* v. *Graham*, 449 U.S. 39 (1980), and *Lee* v. *Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992). The District Court and the Court of Appeals opinions carefully considered both the religious nature of the portrait and the effect of its display in a public school building at which children in the seventh through twelfth grades attend classes, and other members of the community attend social functions.

In *Stone v. Graham*, 449 U.S. 39 (1980), this Court held that the posting of a copy of the Ten Commandments on public school classroom walls violated the Establishment Clause. This Court rejected the state's claimed secular purpose, declaring that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no [ ] recitation of a supposed secular purpose can blind us to that fact." *Id.* at 41. This Court noted:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function.

Id. at 42 (citing *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963)).

A portrait of Jesus Christ which is unrelated to any course or curriculum and not part of a larger secular display is likewise "undeniably [ ] sacred" in the Christian faith, and this Court should not be blinded to that fact by Petitioners' contrived assertions of secular purpose.

Moreover, just three terms ago this Court reiterated the "heightened concerns with protecting the freedom of conscience from subtle coercive pressure in the elementary and secondary schools." *Lee v. Weisman*, ___ U.S. at ___, 112 S.Ct. at 2658. In *Lee*, this Court struck down *nonsectarian* prayers at public school graduation ceremonies. This Court rejected the suggestion that the plaintiffs were super-sensitive, or the violation minimal:

> [W]e think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, *the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.*

Id. at 2659 (emphasis added).

If an annual public high school event that includes a nonsectarian prayer which takes no more than two minutes violates the Establishment Clause, so too does a permanent portrait of Jesus Christ in a public secondary school which is unrelated to any course or curriculum and which must be viewed by each and every student and member of the community that enters the school.

II. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT, WHO STILL COMES INTO REPEATED, DIRECT AND UNWELCOME CONTACT WITH THE PORTRAIT, CONTINUES TO HAVE STANDING TO CHALLENGE THE DISPLAY.

Likewise, plenary review of the standing issues raised by Petitioners would be pointless. The Court of Appeals holding that Respondent continued to have standing after he graduated from the school is entirely consistent with this Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The Court of Appeals found that Pensinger continued to come into repeated, direct and unwelcome contact with the religious display. *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679, 681, 682-3 (1994); Pet. App. at B-3, B-6. Petitioner has failed to indicate how these factual findings conflict with this Court's standing jurisprudence under the Establishment Clause.

At least four other Circuits have reached similar conclusions in holding that a citizen's impairment of the full use and enjoyment of a public facility due to a religious display confers standing.[2] No Circuit has decided

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[2]*See Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1416 (7th Cir. 1993)(plaintiffs' claim that they avoided the area of the public park where a crucifix memorial was displayed conferred standing); *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265, 268-69 (7th Cir. 1986), *cert. den.*, 479 U.S. 961 (1986)(individuals' altering of behavior to detour in order to avoid illuminated cross on a fire department building is sufficient injury to confer standing); *Harvey v. Cobb County*, 811 F. Supp. 669, 675 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994), *cert. den.*, ___ U.S. ___, 114 S.Ct. 2138 (1994)(citizen attorney whose job on occasion brought him into direct contact with a display of a panel of the Ten Commandments hanging in the courthouse, had standing); *ACLU v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983), *modifying* 678 F.2d 1379 (11th Cir. 1982)(citizens

a case which conflicts with these decisions, and Petitioner does not claim that there is a conflict between any Circuits.[3]

The Petitioners' argument regarding the affidavit submitted to the Court of Appeals by Respondents is highly misleading and incomplete. Petitioners fail to indicate to this Court that it was Petitioners who first submitted affidavits to the Court of Appeals regarding Mr. Pensinger's graduation. *See* fn. 1, *supra*. In complete accordance with Fed. R. App. Pro. 27(a), Respondents filed a response, which included an affidavit. Despite ample opportunity to do so, Petitioners never submitted any contrary documents regarding the assertions made in Mr. Pensinger's affidavit. The Court of Appeals quickly dismissed this same contention at the oral argument of this case.

The Bloomingdale Public Schools are simply seeking Supreme Court review on standing issues properly disposed of by specific factual findings.

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alleging impairment of full use and enjoyment of state park due to illuminated cross had standing); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993), *cert. den. by County of San Diego v. Murphy*, ___ U.S. ___, 114 S.Ct. 2707 (1994)(citizens who had full use and enjoyment of public parks impaired due to the presence of crosses had standing to challenge displays); *Murray v. Austin*, 947 F.2d 147, 151 (5th Cir. 1991), *cert. den.*, ___ U.S. ___, 112 S.Ct. 3028 (1992)(citizen who alleged exposure to city insignia which contained a cross had standing to challenge the insignia).

[3]Petitioners' suggestion that the Court of Appeals decision created an intra-Circuit conflict -- and it did not -- is not a sufficient basis for this Court to grant review. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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DATED: March 10, 1995